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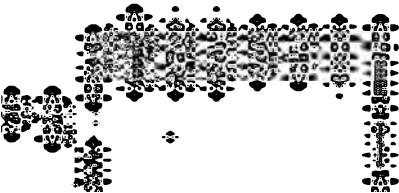
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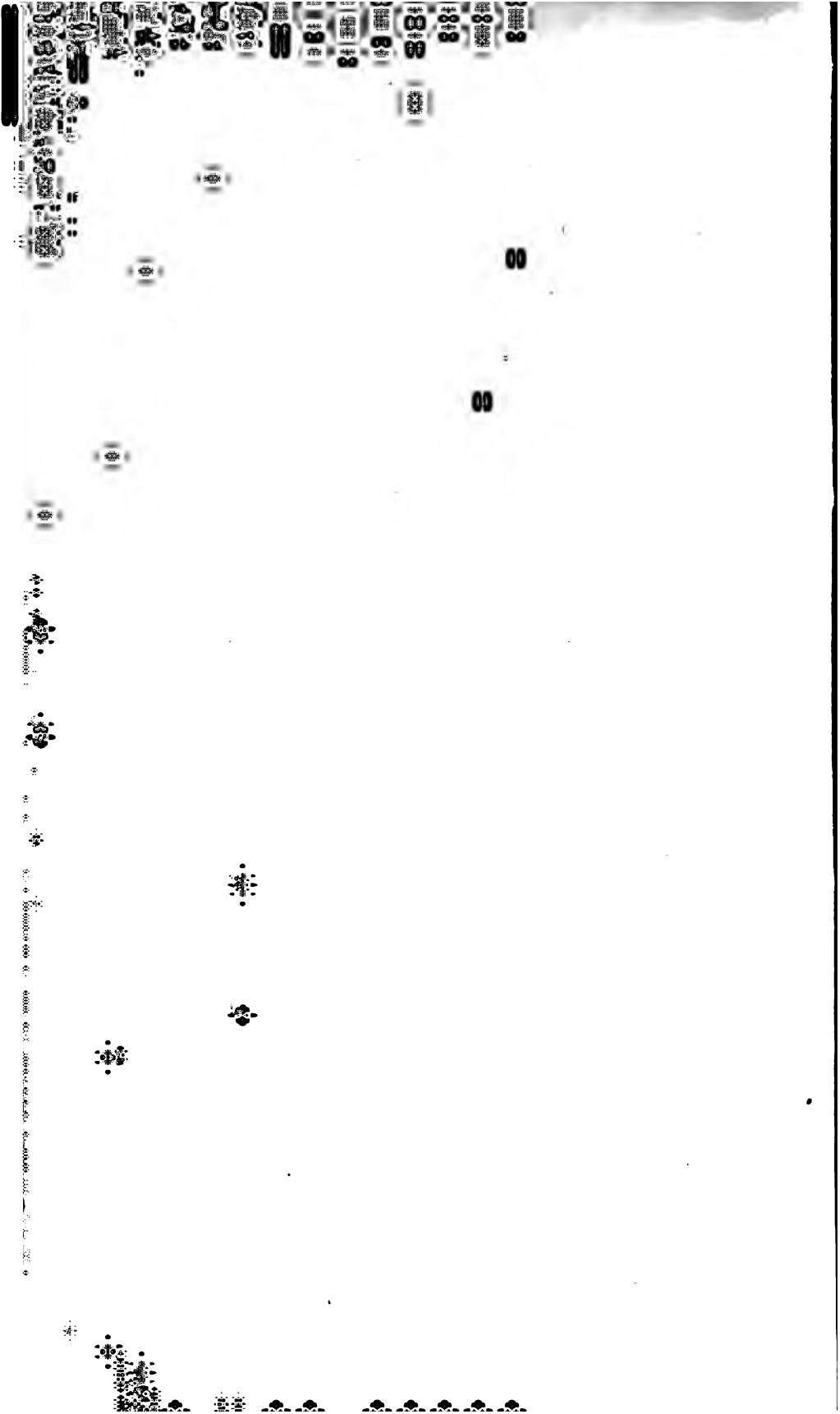
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REPORTS
OF
DECISIONS
IN
THE SUPREME COURT
OF
THE UNITED STATES.

BY SAMUEL F. MILLER, LL.D.,
AN ASSOCIATE JUSTICE OF THE COURT.

VOLUME III.

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DECISIONS
OF THE
SUPREME COURT OF THE UNITED STATES,
DECEMBER TERM, 1858.

JUSTICES OF THE COURT.

HON. ROGER B. TANEY, CHIEF JUSTICE.

HON. JOHN MCLEAN,

HON. JAMES M. WAYNE,

HON. JOHN CATRON,

HON. PETER V. DANIEL,

HON. SAMUEL NELSON,

HON. ROBERT C. GRIER,

HON. JOHN A. CAMPBELL,

HON. NATHAN CLIFFORD,

JEREMIAH S. BLACK, ATTORNEY GENERAL.

WILLIAM THOMAS CARROLL, CLERK.

BENJAMIN C. HOWARD, REPORTER.

WILLIAM SELDEN, MARSHAL.

ASSOCIATE JUSTICES.

GEORGE KENDALL and others, Plaintiffs in Error, v. JOSEPH S. WINSOR.

21 H. 322.

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L-ed 165
129 205

PATENT LAW—DELAY IN OBTAINING PATENT.

1. While an inventor is experimenting with and perfecting his invention, if he voluntarily permits its use by the public, with no attempt to conceal or protect his invention, a party making one of his machines may lawfully use it after the patent has been issued.
2. But if the inventor has endeavored to conceal his invention, and has asserted his design to secure a patent as soon as perfected, one who has surreptitiously obtained knowledge which enables him to construct and use the invention is liable as an infringer if he continue this use after the patent has been obtained.
3. The question of the abandonment of the invention by the inventor to the public, and the surreptitious discovery and use of it by the infringer, are questions to be submitted as matter of fact to the jury, under proper instructions from the court.

THIS is a writ of error to the circuit court for the district of
Vol. iii—1

Kendall v. Winsor.

Rhode Island. The instruction of the court complained of, and all the facts and pleadings, are fully set forth in the opinion.

Mr. Jenckes, for plaintiffs in error.

Mr. Keller, for defendant.

[* 323] * *Mr. Justice DANIEL* delivered the opinion of the court.

This was an action on the case in the circuit court of the United States, instituted by the defendant in error against the plaintiffs, for the recovery of damages for an alleged infringement by the latter of the rights of the former as a patentee. No question was raised upon the pleadings or the evidence in this case as to the originality or novelty of the invention patented, nor with respect to the identity of that invention with the machine complained of as an infringement of the rights of the patentee, nor as to the use of that machine. These several facts were conceded, or at any rate were not controverted, between the parties to this suit.

Under the plea of *not guilty*, the defendant in the circuit court gave notice of the following defenses to be made by him:

1. A license from the plaintiff to use his invention.

2. A right to use that invention in virtue of the seventh section of the act of congress of the 3d of March, 1839, which section provides, "That every person or corporation who has or shall have purchased or constructed any newly-invented machine, manufacture, or composition of matter, prior to the application of the inventor or discoverer for a patent, shall be held to possess the right to use, and vend to others to be used, the specific machine, manufacture, or composition of matter, so made or purchased, without liability therefor to the inventor or any other person interested in such invention."

To the relevancy and effect of the evidence adduced with reference to the two defenses thus notified, and to the questions of law arising upon the issues made by those defenses, this controversy is properly limited.

Upon the trial in the circuit court, in support of this defense, evidence was introduced tending to show that the plaintiff constructed a machine in substantial conformity with his specification as early as 1846, and that in 1849 he had several such machines in operation, on which he made harness to supply all such orders as he could obtain; that he continued to run these machines until he obtained his letters patent; that he repeatedly declared to different persons that the machine was so complicated that he preferred not to take a patent, but to rely on

Kendall v. Winsor.

the difficulty of imitating the machine, and the secrecy in which he kept it. And the defendants also gave evidence tending to prove that the first of their machines was completed in the autumn of 1853, and the residue in the autumn of 1854; and that, in the course of that fall, the plaintiff had knowledge that the defendants had built, or were building, one or more machines like his invention, and did not interpose to prevent them.

The plaintiff gave evidence tending to prove that the first machine built by him was never completed so as to operate; that his second machine was only partially successful, and improvements were made upon it; that in 1849 he began four others, and completed them in that year, and made harness on them, which he sold when he could get orders; that they were subject to some practical difficulties, particularly as it respected the method of marking the harness, and the liability of the bobbin to get out of the clutch; that he was employed in devising means to remedy these defects, and did remedy them; that he also endeavored to simplify the machine by using only one ram-shaft; that he constantly intended to take letters patent when he should have perfected the machine; that he applied to Mr. Keller for this purpose in February, 1853, but the model and specifications were not sent to Washington till November, 1854; that he kept the machines from the view of the public, allowed none of the hands employed in the mill to introduce persons to view them, and that the hands pledged themselves not to divulge the invention; that among the hands employed by the plaintiff was one Kendall Aldridge, who left the plaintiff's employment in the autumn of 1852, and entered into an arrangement with the defendants to copy the plaintiff's machine for them, and did so; and that it was by Aldridge, and *under his superintendence, and by means [* 325] of the knowledge which he had gained while in the plaintiff's employment, under a pledge of secrecy, that the defendant's machines were built and put in operation; and that one of the defendants had procured drawings of the plaintiff's machine, and has taken out letters patent for it in England.

Each party controverted the facts thus sought to be proved by the other.

The defendant's counsel prayed the court to instruct the jury as follows:

1. That it is the duty of an inventor, if he would secure the protection of the patent laws, to apply for a patent as soon as his machine (if he has invented a machine) is in practical working order, so as to work regularly every day in the business for which it was

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designed; and if he does not so apply, he has no remedy against any persons who possess themselves of the invention, with his knowledge and without his notification to desist, or of his claims as an inventor before he applies for his patent.

2. That a machine can no longer be considered as an experiment, or the subject of experiment, when it is worked regularly in the course of business, and produces a satisfactory fabric, in quantities sufficient to supply the entire demand for the article.

3. That in order to justify the delay of the plaintiff in applying for a patent after his machine was in practical working order, on the ground of the desire to improve and perfect it, the plaintiff must show some defect in construction, or difficulty in the operation or mode of operation, which he desired and expected to remove by further thought and study; and if no such thing is shown, then the machine must be held to have been completed and finished, in the sense of the patent law, at the time it was put in regular working use and operation.

4. That under the 7th section of the act of 1839, entitled, &c., if the jury are satisfied that the machines for the use of which the defendants are sued were constructed and put in operation before the plaintiff applied for his patent, then the defendants possessed the right to use, and vend to others to be used, the specific machines made or purchased by them, without liability therefor to the plaintiff; and the jury are to inquire and find only the fact of such construction before the date of the plaintiff's application, in order to render a vendict for the defendants.

5. That under said section of said act, if the machines used by the defendants were purchased or constructed by them before the application of the plaintiff for his patent, with the knowledge of the plaintiff, then they must be held to possess the right to use, and vend to others to be used, the machines so purchased or constructed; and the jury are to inquire into and find only the fact of such purchase or construction, and that the plaintiff had knowledge of the same, in order to render a verdict for the defendants.

6. That under said section of said act, if the machines used by the defendants were purchased or constructed by them before the application of the plaintiff for his patent, without the knowledge of the plaintiff, and without his notifying the defendants of his claim as the inventor, and requiring them to desist from such construction, then they must be held to possess the right to use, and vend to others to use, the machines so purchased or constructed; and the jury are to inquire only into and find the fact of such pur-

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chase or construction, and that the plaintiff had knowledge of the same, and did not notify the defendant to desist from such purchase or construction of his claims as inventor, in order to render a verdict for the defendants.

The court set aside all those prayers for instructions, and did instruct the jury as follows:

1. That if Aldridge, under a pledge of secrecy, obtained knowledge of the plaintiff's machine—and he had not abandoned it to the public—and thereupon, at the instigation of the defendants, and with the knowledge, on their part, of the surreptitiousness of his acts, constructed machines for the defendants, they would not have the right to continue to use the same after the date of the plaintiff's letters patent. *But if the defendants had these machines constructed before the plaintiff's application for his letters patent, under the belief authorized by him that he * consented [* 327] and allowed them so to do,* then they might lawfully continue to use the same after the date of the plaintiff's letters patent, and the plaintiff could not recover in this action. And that if the jury should find that the plaintiff's declaration and conduct were such as to justify the defendants in believing he did not intend to take letters patent, but to rely on the difficulty of imitating his machine, and the means he took to keep it secret, this would be a defense to the action. And they were further instructed, that to constitute such an abandonment to the public as would destroy the plaintiff's right to take a patent, in a case where it did not appear any sale of the thing patented had been made, and there was no open public exhibition of the machine, the jury must find that he intended to give up and relinquish his right to take letters patent. But if the plaintiff did intend not to take a patent, and manifested that intent by his declarations or conduct, and thereupon it was copied by the defendant, and so went into use, the plaintiff could not afterwards take a valid patent.

To which refusal to give the instructions prayed for, as well as to the instructions given, the defendants, by their counsel, excepted before the jury retired from the bar; and, as the matter thereof did not appear of record, prayed the court to allow and seal this bill of exceptions; which, being found correct, has been allowed and sealed accordingly by the presiding judge.

B. R. CURTIS,

[L. S.]

Justice Sup. Ct. U. S.

The first ground of defense assumed under the notice from the defendant in the court below—viz: a license from the patentee—may at once be disposed of by the remark that no evidence was offered on the trial, bearing directly or remotely upon the fact of

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an actual license from the patentee, either to the defendant or to any person whomsoever. The defense then must depend exclusively upon the proper construction of the section of the law above cited, and the application of that section to the conduct of the parties, as shown by the bill of exceptions.

It is undeniably true, that the limited and temporary [* 328] * monopoly granted to inventors was never designed for their exclusive profit or advantage; the benefit to the public or community at large was another and doubtless the primary object in granting and securing that monopoly. This was at once the equivalent given by the public for benefits bestowed by the genius and meditations and skill of individuals, and the incentive to further efforts for the same important objects. The true policy and ends of the patent laws enacted under this government are disclosed in that article of the constitution, the source of all these laws, viz: "to promote the progress of science and the useful arts," contemplating and necessarily implying their extension, and increasing adaptation to the uses of society. (*Vide* Constitution of the United States, art. 1, sec. 8, clause 9.) By correct induction from these truths, it follows, that the inventor who designedly, and with the view of applying it indefinitely and exclusively for his own profit, withholds his invention from the public, comes not within the policy or objects of the constitution or acts of congress. He does not promote, and, if aided in his design, would impede, the progress of science and the useful arts. And with a very bad grace could he appeal for favor or protection to that society which, if he had not injured, he certainly had neither benefited nor intended to benefit. Hence, if, during such a concealment, an invention similar to or identical with his own should be made and patented, or brought into use without a patent, the latter could not be inhibited or restricted, upon proof of its identity with a machine previously invented and withheld and concealed by the inventor from the public. The rights and interests, whether of the public or of individuals, can never be made to yield to schemes of selfishness or cupidity; moreover, that which is once given to or is invested in the public, cannot be recalled nor taken from them.

But the relation borne to the public by inventors, and the obligations they are bound to fulfill in order to secure from the former protection, and the right to remuneration, by no means forbid a delay requisite for completing an invention, or for a test of its value or success by a series of sufficient and practical experiments; [* 329] nor do they forbid a discreet and * reasonable forbearance to proclaim the theory or operation of a discovery during

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its progress to completion, and preceding an application for protection in that discovery. The former may be highly advantageous, as tending to the perfecting the invention; the latter may be indispensable, in order to prevent a piracy of the rights of the true inventor.

It is the unquestionable right of every inventor to confer gratuitously the benefits of his ingenuity upon the public, and this he may do either by express declaration or by conduct equally significant with language—such, for instance, as an acquiescence with full knowledge in the use of his invention by others; or he may forfeit his rights as an inventor by a willful or negligent postponement of his claims, or by an attempt to withhold the benefit of his improvement from the public until a similar or the same improvement should have been made and introduced by others. Whilst the remuneration of genius and useful ingenuity is a duty incumbent upon the public, the rights and welfare of the community must be fairly dealt with and effectually guarded. Considerations of individual emolument can never be permitted to operate to the injury of these. But, whilst inventors are bound to diligence and fairness in their dealings with the public, with reference to their discoveries on the other hand, they are by obligations equally strong entitled to protection against frauds or wrongs practiced to pirate from them the results of thought and labor, in which nearly a lifetime may have been exhausted; the fruits of more than the *viginti annorum lucubrationes*, which fruits the public are ultimately to gather. The shield of this protection has been constantly interposed between the inventor and fraudulent spoliator by the courts in England, and most signally and effectually has this been done by this court, as is seen in the cases of *Pennock & Sellers v. Dialogue*, (2 Peters, 1,) and of *Shaw v. Cooper*, (7 Peters, 292.) These may be regarded as leading cases upon the questions of the abrogation or relinquishment of patent privileges as resulting from avowed intention, from abandonment or neglect, or from use known and assented to.

Thus, in the former case, the court, on page 18, interpreting the phrase, “*not known or used before the application for a patent*,” *make the inquiry, ‘what is the true meaning of [* 330] the words *not known or used*,’ &c. They cannot mean that the thing invented was not known or used before the application by the inventor himself; for that would be to prevent the only means of his obtaining a patent. The USE as well as the KNOWLEDGE of his invention must be indisputable, to enable him to ascertain its competency to the end proposed, as well as to perfect its component

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parts. The words, then, to have any rational interpretation, must mean, *not known or used by others* before the application. But how known or used? If it were necessary, as it well might be, to employ others to assist in the original structure or use by the inventor himself, or if before his application his invention *should be pirated by another, or used without his consent*, it can scarcely be supposed that the legislature had within its contemplation such knowledge or use." Further on in the same case, page 19, the court say: "If an inventor should be permitted to hold back from the knowledge of the public the secrets of his invention, if he should for a long period of years retain the monopoly, and make and sell his invention publicly, and thus gather the whole profits of it, relying on his superior skill and knowledge of the structure, and then, and then only, when the danger of competition should force him to secure the exclusive right, he should be allowed to take out a patent, and thus exclude the public from any further use than what would be derived under it during his fourteen years, it would materially retard the progress of science and the useful arts, and give a premium to those who should be least prompt to communicate their discoveries." In *Shaw v. Cooper*, (7 Peters,) this court, on page 319, in strict coincidence with the decision in 2 Peters, say: "The knowledge or use spoken of in the statute could have referred to the public only, and cannot be applied to the inventor himself; he must necessarily have a perfect knowledge of the thing invented and its use, before he can describe it, as by law he is required to do preparatory to the emanation of a patent. But there may be cases in which the knowledge of the invention *may be surreptitiously obtained*, and communicated to the public, that do not affect the right of the inventor. Under such circumstances,

[* 331] * no presumption can arise in favor of an abandonment of the right to the inventor to the public, though an acquiescence on his part will lay the foundation for such a presumption."

The real interest of an inventor with respect to an assertion or surrender of his rights under the constitution and laws of the United States, whether it be sought in his declarations or acts, or in forbearance or neglect to speak or act, is an inquiry or conclusion of *fact*, and peculiarly within the province of the jury, guided by legal evidence submitted to them at the trial.

Recurring now to the instruction from the judge at circuit in this case, we consider that instruction to be in strict conformity with the principles hereinbefore propounded, and with the doctrines of this court, as declared in the cases of *Pennock v. Dialogue* and *Shaw v. Cooper*. That instruction diminishes or excludes no proper

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ground upon which the conduct and intent of the plaintiff below, as evidenced either by declarations or acts, or by omission to speak or act, and on which also the justice and integrity of the conduct of the defendants were to be examined and determined. It submitted the conduct and intentions of both plaintiff and defendants to the jury, as questions of *fact* to be decided by them, guided simply by such rules of law as had been settled with reference to issues like the one before them; and upon those questions of fact the jury have responded in favor of the plaintiff below, the defendant in error. We think that the rejection by the court of the prayers offered by the defendants at the trial was warranted by the character of those prayers, as having a tendency to narrow the inquiry by the jury to an imperfect and partial view of the case, and to divert their minds from a full comprehension of the merits of the controversy. The decision of the circuit court is affirmed, therefore, with costs.

MARY ANN THOMAS, Plaintiff in Error, v. ELIZA LAWSON and others.

21 H. 331.

TAX TITLES.

1. An objection that a deed on a sale for taxes shows fraud on its face, which points to no special indication of fraud, cannot be noticed in this court.
2. The statutes of Arkansas make the sheriff's deed on a sale for taxes evidence of the regularity and legality of such sale, and this casts the burden of showing the opposite on the other party.
3. There is also a statute of the same State which authorizes a petition in the nature of a bill in chancery to confirm and quiet the title acquired by a tax deed; and when a decree is rendered on such petition, where all persons have been notified by publication to come on and defend, it is conclusive of the title. *Parker v. Overman*, 18 How. 140; 1 Miller, 121.

THIS was a writ of error to the circuit court for the eastern district of Arkansas, and the case is very fully stated in the opinion.

Mr. Fowler, for plaintiff in error.

Mr. Watkins, for defendants.

* Mr. Justice DANIEL delivered the opinion of the court. [* 333]

This was an action of ejectment, instituted by the plaintiff, a citizen of Indiana, and as sole heiress of John Crow, deceased, against James Lawson, a citizen of the State of Arkansas, for the recovery of a tract of land situated in the State last mentioned.

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described in the declaration, and averred to be of greater value than two thousand dollars. Pending the proceedings in the circuit court, Lawson, the original defendant, having died, the cause was revived against the defendants upon the record as his heirs, and upon a trial of the cause, on the 16th day of April, 1856, the jury rendered a verdict for the plaintiff, and on that verdict the court gave a judgment in favor of the plaintiff, with costs of suit. At a subsequent day of the term, the court, on motion of the defendants, awarded a new trial in their behalf; and on the 22d day of April, 1857, this cause being again heard, a verdict was rendered in favor of the defendants below, the defendants in error, and upon this verdict the court pronounced judgment in behalf of the defendants, inclusive of all the costs of suit.

In this action the defendant pleaded six several pleas: first, the general issue not guilty, on which there was a joinder; and five other pleas, all of which were either stricken out or over-
[* 334] * ruled upon demurrer except the fifth, to the following effect: that the defendant was a purchaser of the tract of land in the declaration mentioned, at a sale made by the sheriff and collector of the revenue of the county in which the said land was and is situated, for the non-payment of the taxes assessed and due thereon, and that he has held the peaceable, adverse, and uninterrupted possession of the said land under and by virtue of his said purchase for more than five years next before the commencement of this suit. On this fifth plea, also, issue was joined.

Upon the trial in the court below, the plaintiff gave in evidence a patent from the United States, bearing date on the 1st day of February, 1821, to the plaintiff and others, heirs of John Crow, deceased, for the land in contest, which patent was read without objection, the titles of both plaintiff and defendants being deducible from that act of the government. The plaintiff further proved that she was the only surviving child and the sole heir of John Crow, and was the widow of James Thomas, who died in the year 1840; and that from the year 1839 she had resided in the State of Indiana, and was a citizen of that State. The plaintiff further proved the possession of Lawson, the ancestor of the defendants, of the land at the time of the institution of this suit, and his refusal to surrender possession to the plaintiff. And here the plaintiff rested her case upon the evidence.

The defendants, in support of their title and right of possession, offered in evidence a deed, bearing date on the 2d day of November, 1846, from W. B. Borden, at that date sheriff, and as such *ex officio* assessor and collector of the taxes for the county of Pulaski,

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in which county the lands in contest are situated, conveying those lands to the ancestor of the defendants.

In this deed it is recited, that in the year 1824, in conformity with the laws in force in the then territory of Arkansas, the lands in contest, with several other parts of sections, all situated in the county of Pulaski, were by the sheriff, as *ex officio* assessor and collector for the county, assessed for the taxes payable thereon for that year. That in conformity with the law, and within the time thereby prescribed, the sheriff, as *ex officio* assessor and collector, filed in the office of clerk of the county court a list of lands and town lots owned and assessed to persons then residents of said county, in which list the lands in the said deed were embraced; that a copy of the list so made and filed was by the said officer put up at the door of the court-house of said county, and published in the *Arkansas State Gazette*, a newspaper printed in the territory, for four weeks successively before the day of sale, as prescribed by law. That the sheriff as *ex officio* assessor and collector, in like conformity with law, on the 1st day of November, 1824, exposed and offered for sale, at the court-house of the said county, at public auction, the several parcels or parts of sections of land above mentioned, for the payment of the taxes, and the penalty payable upon the amount of those taxes. That Thomas Newton became the purchaser of the several parcels of land, and transferred his certificate of his purchase of those lands to James Lawson. That the sheriff, as *ex officio* assessor and collector, made out and delivered to the purchaser a certificate of purchase containing the requisite description of the taxes and penalty on the lands listed for taxation, and that the amount was paid by Newton, the purchaser. That one year having elapsed since the sale by the sheriff, and that Newton, by James Lawson, having presented to Borden, the sheriff and *ex officio* assessor and collector, the certificate of purchase, and requested a deed to Lawson from the sheriff, the deed from Borden, as sheriff, &c., was made to Lawson.

The defendants next offered in evidence, under the certificate of the clerk of the circuit court of Pulaski county, a copy from the records of that court of the acknowledgment in open court, on the 13th of July, 1849, by Borden, as late sheriff and collector of Pulaski county, of the deed executed by him to Lawson for the several parcels of land therein described, including the land in controversy, as having been sold by the predecessor of said Borden as sheriff and collector, under and by virtue of a levy and distress made upon such tracts of land to secure the payment of the State and county taxes, and the penalty and costs and charges due for the years 1824 and 1825.

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[* 336] * The defendants also proved that Thomas Newton, by a deed bearing date on the 21st of May, 1846, assigned and conveyed to James Lawson, in his lifetime, all the right, title, interest, and claim, in and to the lands purchased by Newton of the sheriff in the year 1824, and embraced in the deed from Borden, sheriff, &c., to Lawson.

The defendants then offered the record, duly certified, of the proceedings on the chancery side of the circuit court of the county of Pulaski, on the 20th day of February, 1850, upon a petition in the name of James Lawson in his lifetime, setting forth the several facts and transactions recited in the deed from Borden to Lawson, and also the execution and recording of that deed; and further setting forth that he, Lawson, after the time allowed by law for the redemption of said lands, and more than six months before the commencement of the then present term of this court, caused a notice stating the authority under which said sheriff's sales took place, and also containing the same description of the lands purchased as that given in said sheriff's deed, and declaring the price at which said tracts were respectively bargained, the nature of the title by which the same are held, and calling on all persons who could set up any right to any part of said lands, in consequence of any irregularity or illegality connected with said sales, to show cause at the first term of the circuit court of said county, six months after the publication of said notice, being the present term of the court, why the respective sales so made should not be confirmed, pursuant to a petition to be filed in this court for that purpose, to be inserted and published in the *Arkansas State Democrat*, a newspaper published in Little Rock, for six weeks in succession, the last insertion to be more than six months before the commencement of the present term of this court, as by affidavit of the publisher, setting forth a copy of such notice, with the date of the first publication thereof, and the number of insertions sworn to and subscribed before a justice of the peace of said county, and properly authenticated and filed with said petition, fully appears to the court, and concluding with the decree of that court in the following words:

[* 337] * "Whereupon all and singular the allegations made in said petition being by the production of said deeds and due proofs of the publication of said notice proven and established to the satisfaction of the court here, and no cause having been shown against the prayer of said petition by any person whomsoever, but the said application being and remaining wholly undefended—

"It is therefore considered and adjudged and decreed by the

court here, that said sheriff's sales, and each of them, be, and the same are hereby, in all things confirmed, according to the statute in such case made and provided; and further, that this decree shall operate as a complete bar against any and all persons hereafter claiming said lands, or any part thereof, in consequence of any informality or illegality in any of the proceedings aforesaid, and that the title of each of said tracts of land be decreed and considered as hereby confirmed and completed in said James Lawson and his heirs and assigns forever; saving, however, to infants, persons of unsound mind, imprisoned, beyond the seas, or out of the jurisdiction of the United States, the right to appear and contest the title to said lands, within one year after their disabilities may be removed. And it is ordered that the petitioner pay the costs thereof."

To the admission of this record, the plaintiff on the circuit court objected, but the court permitted it to be read in evidence. The deed from Borden, sheriff, to Lawson, of the 2d of November, 1846, was also objected to by the same party, but was allowed to be given in evidence to the jury.

Several prayers for instruction were presented, both by the plaintiff and the defendants, and decisions thereon were made by the court. We shall consider the following only, as comprising the real merits of this controversy:

The objections urged against the admission of the deed from the sheriff to Lawson were—

1st. That the deed and the certificate of its admission to record bore upon their face unmistakable evidence of fraud. What those clear marks of fraud upon the face of those documents were, is not stated with sufficient particularity, in order to a correct comprehension of their character. The court to *whom [* 338.] this objection was presented must have decided upon an inspection of the papers, (probably correctly;) but whether correctly or otherwise, this court cannot now inquire, in compliance with assertions altogether vague, and pointing to no specific vice in any one of those papers. This first objection, therefore, to the admissibility of the deed is of no force.

But the deed from Borden was further objected to, because, as it was alleged—

Secondly. That there was no valid proof of the execution of such paper as a deed.

Thirdly. There was no proof of the authority of the said William B. Borden to execute such deed, or that he was, at the date of its execution or acknowledgment, collector of taxes in and for said county of Pulaski.

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Fourthly. It was not accompanied by proof that the said tract of land in controversy was either assessed, or taxed, or advertised, or legally sold, in the year 1824, for taxes, or that the said Henry Armstrong, as such alleged sheriff, assessor, and collector, in the year 1824, had any authority to assess said tract of land for taxation, or to sell it for the non-payment of such taxes.

Fifthly. That such paper, purporting to be such deed, was not admissible in evidence until it should be first proved that all the material steps required by law, preparatory to and in the assessment and taxation of said tract of land, and in the advertisement and sale thereof in the year 1824, and all previous steps required by law prior to the execution of such deed, had been complied with, either by record evidence or by evidence *in pais*.

These four objections are met and overcome, first, by the language of the statutes of Arkansas; and secondly, by the interpretation given of those statutes by the supreme court of that State. By the law of Arkansas regulating conveyances, (*vide* Digest of the Laws of 1848, by English and Hempstead, p. 268, sec. 26,) it is declared that "every deed or instrument of writing conveying or affecting real estate, which shall be acknowledged or proved and certified as prescribed by that act, may, together [* 339] with the certificate of acknowledgment, be * recorded by the recorder of the county where the land to be conveyed or affected thereby shall be situate; and when so recorded, may be read in evidence in any court in this State without further proof of execution." Again, in the same Digest, (pp. 888, 889, sec. 112, title REVENUE,) it is declared, with respect to sales and conveyances made by the sheriff and collector for the non-payment of taxes, that "the deed so made by the collector shall be acknowledged and recorded as other conveyances of lands, and shall vest in the grantee, his heirs or assigns, a good and valid title, both in law and equity; and shall be received in evidence in all courts of this State as a good and valid title in such grantee, his heirs, or assigns, and shall be evidence of the regularity and legality of the sale of such lands." Again, (p. 889, sec. 114,) it is provided, "that if any collector shall die or be removed from office, or his term of service expire, after selling any land for taxes, and before making and executing a deed for the same, the collector then in office shall make and execute a deed to the purchaser of such lands, in the same manner, and with the like effect, as the officer making such sale would have done."

By another provision of the statute of Arkansas, a like power to that previously mentioned as vested in the sheriff, with respect to

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delinquent lands, is conferred upon the auditor of public accounts, and, in the exercise of that power by the latter officer, the provisions of the statute, both as to the acts to be performed, and the consequences to ensue from those acts, are substantially and almost literally identical with those relating to the proceedings by the sheriff.

Thus, (Dig. p. 893, sec. 141,) it is enacted that "the auditor shall execute, under his hand and the seal of his office, and deliver to each person purchasing lands or lots at such sale, a deed or conveyance, in which he shall describe the lands or lots sold, and the consideration for which the same were sold, and shall convey to the purchaser all the right, title, interest, and claim, of the State thereto;" and by section 142, "the deed so made shall vest in the grantee, his heirs or assigns, a good and valid title, both in law and equity, and shall be received in all the courts of this State as evidence of a good and valid title in * such grantee, [* 340] his heirs or assigns, and shall be evidence *that all things required by law to be done to make a good and valid sale were done, both by the collector and auditor.*"

In the interpretation of this provision *in pari materia*, the supreme court of Arkansas, in the case of *Merrick and Fenno v. Hutt*, (15 Arkansas Reports, p. 338,) say: "A more comprehensive provision could hardly be found, and it might seem, at first view, to make the tax title derived from the auditor valid against all objections. But that was not the design. The evil to be remedied was, that the entire burden of proof was cast on the purchaser, to show that every requisite of the law had been complied with, and the deed of the officer was not even *prima facie* evidence of the facts therein stated. The general and prevailing principle was, that to divest the owner of land by a sale for taxes, every preliminary step must be shown to be in conformity with the statute; that it was a naked power, not coupled with an interest, and every prerequisite to the exercise of that power must precede it, and that the deed was not *prima facie* evidence that these prerequisites had been observed. The intention and scope of the statute were to change this rule so far as to cast the *onus probandi* on the assailant of the tax title, by making the deed evidence of the title of the purchaser, subject to be overthrown by proof of non-compliance with the substantial requisites of the law. Proof, then, that any of the substantial requisites of the law had been disregarded, or that the taxes have been paid, no matter by whom, would be sufficient to destroy the tax title, whether emanating from the auditor or the collector. The deed of the auditor is not

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required to *contain recitals*. All that is necessary is to describe the property sold, and the consideration, and to convey to the purchaser all the right, title, interest, and estate, of the former owner, as well as all the right, title, interest, and claim, of the State, to the land."

The same exposition of the statutes of Arkansas, and of the policy and necessity in which those statutes have had their origin, is given in the case of *Pillow v. Roberts* in this court, reported in the 13th of How. 472. The deed, then, from the sheriff and Collector Borden to Lawson, was clearly *prima facie* [* 341] * evidence of the assessment, taxation, and forfeiture of the land; of the regularity of every proceeding previously to the sale of the land forfeited; of the competency of the officer making the sale and conveyance; of the legal validity of the sale; and cast upon the assailant of any of these prerequisites the burden of showing the absence or defectiveness of any of them. And without such a showing, that which was *prima facie* proof will be taken as conclusive.

But every question with respect to the assessment of the lands in controversy, or the non-payment of the taxes, or the regularity of the proceedings of the sheriff and collector, inclusive of the execution and recording of the deed from that officer, seems to have been concluded by the petition of the purchaser on the chancery side of the circuit court of Pulaski county, and the decree of confirmation pronounced upon that petition as herein already mentioned.

The provisions of the law by which this petition by the purchaser from the sheriff or auditor of lands sold for the non-payment of taxes, and by which the proceedings upon such a petition, and the effect of a decree of confirmation pronounced thereupon, are contained in the Digest of the Laws, pp. 966, 967, under the head of Tax Titles, sections from one to six, inclusive. By the section last mentioned (6th) it is declared, that the judgment or decree confirming said sale shall operate as a complete bar against any and all persons who may thereafter claim said land in consequence of informality or illegality in the proceedings, and the title to said land shall be considered as confirmed and complete in the purchaser thereof, his heirs and assigns, forever. The decree of the circuit court of the county of Pulaski, before referred to, expressly sets forth a compliance with every requisite prescribed in the foregoing six sections of the statute, including the notice by publication calling on all persons to show any objection to the purchase from the officer, in consequence of informality, irregularity, or illegality connected with the sale of the lands; the failure of any contestant to

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appear in obedience to such notice, and the expiration of the time limited in the saving reserved in behalf of those of whom exception is made in the statute.

* Upon an inspection of the proceedings in the court of [* 342] Pulaski, the court below was of the opinion that it constituted a valid title in the defendant against the whole world, and charged the jury that "it divested the title of the plaintiff, and that since the rendition of said decree she had no title to the said tract of land, unless she has, since the date of the said decree, obtained title thereto from or under the said James Lawson, or unless such decree was obtained by fraud."

Of the effect of a decree of confirmation like the one in this case there exists no doubt under the construction of the statutes of Arkansas by the supreme court of that State, as declared in the case of *Evans & Black v. Percifull*, (5th Arkansas Rep. 425.) The court in that case held the decree to be conclusive, although they thought it erroneous; yet, inasmuch as it had not been reversed for error, they ruled that it could not be collaterally impeached; and they say, in express terms, that had there been no deed from the officer, *in fact, the decree would have been conclusive of the sufficiency of the evidence to warrant it.*

In the case of *Parker v. Overman*, in 18 Howard, 140, this court, commenting upon the statute of Arkansas, has said: "In case no one appears to contest the regularity of the sale, the court is required to confirm it on finding certain facts to exist; but if opposition is made, and it should appear that the sale was made contrary to law, it became the duty of the court to annul it. The judgment or decree in favor of the grantee in the deed operates as a complete bar against any and all persons who may thereafter claim such land in consequence of any informality or illegality in the proceedings. The jurisdiction of the court over the controversy is founded on the presence of the property, and like a proceeding *in rem* it becomes conclusive against the absent claimant as well as the present contestant."

This interpretation of the statutes of Arkansas is fully coincident with that propounded by the cases of *Merrick & Fenno v. Hutt*, and of *Evans & Black v. Percifull*, already cited; and sustained the correctness of the instructions of the circuit court as to the effect of the decree of confirmation of the circuit court of Pulaski county.

* A question was raised in the circuit court, as to the [* 343] effect of the five years' statutory limitation upon the rights of the parties; as, for instance, whether that statute would begin to

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run from the date of the deed of the sheriff or from the period of the recording of that deed, or whether it could operate at all upon a constructive seizin effected by the sheriff's deed, or required, in order to give it effect, an *actual seizin* by the purchaser from the sheriff. This question we do not deem it necessary, or even regular, in this case to discuss or determine. In the first place, the rulings in the court below with regard to it were in favor of the plaintiff in error, and therefore can constitute no wrong or gravamen on his part. In the next place, we consider that question embraced and concluded, or rather excluded, by the proceedings in chancery against the property, and the confirmation of the title by the decree.

The judgment of the circuit court is affirmed.

THE SHIP PONS AELII.

FINLAY MCKINLAY and another, Appellants, v. WILLIAM MORRISH.

21 H. 343.

ADMIRALTY—PLEADINGS.

1. Where, both in the libel and answer, the issue made is upon the improper stowage of the cargo, and carelessness in landing, reloading, and re-storing under a deck which was leaky, the court cannot inquire into the seaworthiness of the vessel, or any other cause of injury than the one thus put in issue.
2. The court finds in this case, from an examination of the testimony, that the injury did not accrue from either of the causes charged in the libel.
3. The injury to the goods (soap) was the result of a sweating process, caused by the agitation of the vessel and the high temperature, for which the vessel is not liable.
4. Whatever may be the rule of courts of common law, as to the circumstances under which a consignee may sue for an injury to the cargo, there is no difficulty in the way of such suit in a court of admiralty.

APPEAL from the circuit court for the northern district of California. The case is fully stated in the opinion.

Mr. Lord, for appellants.

Mr. Brent and *Mr. Johnson*, for appellee.

[* 345] * Mr. Justice WAYNE delivered the opinion of the court.

This is the case of a foreign vessel having been libeled in a port of the United States when about to leave it; her master having refused to pay for the damage said to have been sustained on a shipment of soap, made at Liverpool, to be carried to San Francisco, California, *via* Honolulu. The shipment was made by

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Matthew Steele & Son. It was said in the bill of lading to be in good order and condition, and the undertaking was to deliver it so to Messrs. McKinlay, Garriock & Co., or to their assigns.

The consignees libeled the ship, alleging that, though they were always willing to receive the shipment in good order, the master of the ship had not made it, and that they had refused to receive it, on account of the injury it had sustained from a want of proper care in loading, storing, landing, re-landing, and re-storing the soap, and, owing to the careless, negligent, and improper manner of storing it under the deck of the ship, which was open and leaky, through which water passed, and damaged it to the amount of nine thousand five hundred dollars.

The respondent meets the charges by a direct denial of them, averring if the soap had been in any way injured, it may have been from causes beyond his control by any care whatever, and should be attributed to causes or perils excepted to, as they were expressed in the bill of lading, viz: "all and every danger and accident of the seas and navigation of whatsoever nature." The respondent also declares that his ship was, at the time of her sailing from Liverpool, in good, tight, and strong condition, well manned, and that her cargo was well dunnaged and stowed; but that, in the course of passage to Honolulu, she encountered heavy storms and gales, which strained and caused her to leak, and had compelled him to throw overboard a part of the cargo, for the preservation of the rest of it, and of the vessel; and that during the passage * he had used every precaution to preserve the [* 346] cargo that was within *his* power and that of his officers and crew.

The libel and answer are directly at issue, and no answer can be made more responsively to the charges in a bill than this is.

Accordingly, then, to the rules of pleading in admiralty, there is no necessity for doing so; nor are we permitted to consider much of the testimony in this record. When litigants make their case in express allegations and by express denials of them, and then introduce testimony inapplicable to the issues they have made, it is not a part of the case, unless as it shall inferentially bear upon other evidence properly in it, upon which the parties rely for the determination of their controversy. This case furnishes as apt an illustration of the rule just mentioned as can be given. The libelants put their case upon bad and careless stowage, &c., of the soap, and upon leaks in the deck of the ship, through which water passed and damaged it. The respondent denies both; but he goes on to state that his ship was tight and strong for the voyage when

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he left Liverpool, and both parties question the witnesses as to that fact; though the libelants had not charged that their goods had been injured from that cause, and had not put in issue at all the soundness and seaworthiness of the ship for the voyage she was about to make. This same point of pleading was before this court in the case of *Lawrence v. Minturn*, 17 Howard, 100, 110, 111, which was as learnedly argued, and as deliberately decided, as any other case in admiralty has been in our time. This court then said: "We find the conduct of the master in making the jettison to have been lawful; and the remaining inquiry is, whether the necessity for it is to be attributed to any fault on the part of the master or owners. The libel alleges the loss of the goods to have been through the mere carelessness (just as the libel in this case does) and misconduct of the master and mariners. We were at first inclined to the opinion that this allegation is not broad enough to put in issue what the libelants have at the hearing so much insisted upon, and what we think is the main question in this part of the case, *the sufficiency of the ship to carry the cargo*."

[* 347] It *is no doubt the general rule, that the owner warrants his ship to be seaworthy for the voyage with the cargo contracted for. But a breach of this implied contract of the owner does not amount to negligence or want of skill of the master and mariners. There would be much difficulty, therefore, in maintaining, as a general proposition, that an allegation of negligence of the master would let in the libelant to prove unseaworthiness of the vessel." And in the next paragraph of that opinion, page 111, it will be seen that the rule of pleading in such cases was not enforced only upon the ground that the inquiry in that case necessarily led to an examination whether the *jettison was occasioned by the negligence of the master in overloading the ship*.

It was a nice distinction, but a true one, and it will have its influence hereafter upon other cases having the same difficulties as that had. It has been adverted to, to warn the profession that the irregularities of pleading in admiralty, now too frequently occurring, have attracted our attention, and will be treated hereafter according to the rules and practice for pleadings and proofs in admiralty cases. Without doing so, the jurisdiction of admiralty may often be practically extended to controversies not belonging to it; and though that may be inadvertently done, it will not be the less mischievous.

With this rule in view, we will not examine much of the testimony in the case before us, though it was made much of the argument of the respective counsel representing the parties. It ex-

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cludes from the merits of the case all in the record relating to the storm in the Bay of Biscay, the leak which it caused, and the repair of it. Both parties have treated it, by their pleadings, as having in no way caused any damage to the soap; also, the storm which afterwards tried the seaworthiness of the ship to the utmost, when she was weathering Cape Horn, without any diminution of it, except so far as to inquire if it could have been that the seas which she then shipped had damaged the soap, by the water passing through the seams of a deck imperfectly caulked. And we exclude, also, all that testimony made up of the opinions of supposed experts in regard to the causes of the alteration in the quality of the soap, *excepting such of them as are sus- [* 348] tained by facts which have the character of legal proof.

By treating the case in this way, the controversy becomes exclusively one upon the alleged want of proper care in stowing, &c., the soap; and upon the charge made against the captain of the ship, that he had negligently allowed the seams of her deck to be in an open and leaking condition, by which water had passed through them upon the soap.

Our examination of the case has been made accordingly. It will be found to coincide with the admissions made in his argument by the learned counsel of the appellants. Two of his points were, that the injury or change in the quality of the soap was not owing to the effects of the gale occurring in the Bay of Biscay, shortly after the ship left Liverpool, though it had produced a leak; next, that the heavy weather on the passage around Cape Horn did not produce any leak nor do any injury to the tightness of the ship, reserving, however, the charge that the water which she then shipped had passed through the leaks in her deck, and damaged the soap. Then, after stating other propositions of obligation upon the ship, before she could be released from liability, and omissions of duty by the captain, and the proofs which were necessary to excuse them, which he contended had not been made, the case was put altogether upon bad stowage, and the leaks in the deck, as both had been alleged in the libel.

First, as to the stowage. Two witnesses were examined, both of them professing to know how soap in boxes should be stowed for a long passage. They say that the stowage was improper, on account of the boxes having been placed or piled in tiers in one part of the ship, and that they were stowed up to the main deck, and not chocked. One of them added, that regard should be had, in stowing, to the nature of the goods to be stowed; that soap should not be stowed in so solid a bulk as this was, but should

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have been distributed more over the ship. Waterman, another witness, who had never seen the ship, and of course knew nothing of the stowage, merely said that soap stowed twenty-five tiers deep, he should think was badly stowed, and would be [* 349] apt to be injured. Such is the * whole of the testimony to prove bad stowage in this case, unless the opinions of other witnesses, expressed in the course of their examination, without any facts having been given by them to sustain their opinions, are taken as evidence. On the other hand, Nicholson, a man of more than thirty years' experience as a nautical man, who visited the ship by the invitation of the port warden, to examine the soap, and who went into the hold for that purpose, says, in answer to the question, "How was the cargo stowed? Some of the boxes appeared to me to be re-stowed. I do not think the upper part was the original stowage. There were a great number of them in sight, and the cargo seemed to me to be very well stowed." Noyes, who was called upon, as port warden, to survey the ship, and two days afterwards to survey the cargo, says the soap was stowed in the after part of the ship, abaft the after hatch. It was all stowed together, and well stowed. Then Lowry, the stevedore who discharged the cargo of the ship, who saw her hatches opened, says the soap was well stowed.

There are differences between the witnesses as to the stowage of the soap, but not contradictory assertions. As to credit, they stand alike. But there is a distinction in their declarations, which, with us, is conclusive. The three first named speak of the manner of stowage, with reference to the effect which might be produced upon soap in boxes, stowed in a vessel in tiers, as these boxes were. Without a word of proof from themselves, or from any one else, or from Mr. McCulloch, the chemist, who was called upon by the libelants to analyze the soap as it then was, to show the correctness of the apprehension or opinion of the witnesses, that, from the composition of soap, it was liable to deterioration from being stowed in a mass in the hold of a vessel, and without any evidence that it was customary to stow soap, in boxes, differently. The other three witnesses speak of it as a nautical stowage, and, without any qualification, say that the soap was well stowed. Our conclusion is, that the soap was not injured as a consequence from having been stowed as it was.

We proceed to the consideration of the second charge in the libel.

It is also an imputation of negligence upon the captain [* 350] * of the ship. It is, that the soap had been injured by the deck having been allowed by him to remain in an open and

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leaking condition, whereby the water thrown or falling on it passed through upon the soap beneath. It is indefinite as to the time when the leaking of the deck occurred, and uncertain as to the extent of it, but determinate enough to suggest the kind and quantity of testimony which is necessary to sustain such charge in the circumstances under which it has been made. The seaworthiness of the ship when she began the voyage not having been questioned in the libel, it must be taken that she was tight in her deck when she left Liverpool, and, if she became otherwise afterwards, that it must have occurred when she was at sea. There is no direct proof of it in the record, nor any cause, from tempest or storm, from which such an injury to the ship can be presumed. The burden of proof of such an allegation is upon the libelants, and the testimony to sustain it must be positive, or so violently presumptive as to be sufficient, by the rules of evidence, to supply the want of direct proof. Here there is no proof, positive or presumptive, when, where, or from what cause, the leaking of the deck happened, or had been made. None that it had been, or might have been, occasioned by any straining of the ship from the storms which she had encountered on her passage. Indeed, that is disclaimed. None that the oakum with which her decks were caulked had washed out of the seams of it, or that it had shrunk so as to leave them open. And it was only suggested that they were opened by the heat of a long summer passage, and that they could have been recaulked after.

The suggestion is in opposition to the proofs in the case. The ship sailed from Liverpool on the 26th of September, stanch and tight, and arrived at Valparaiso on the 26th or the 27th of January following, just four months and a day from the time of her sailing. The slight injuries which she suffered from the storm in the Bay of Biscay and those encountered off Cape Horn, were repaired at Valparaiso. Thence she went to Honolulu, on the 28th of February, where she was twenty-four days, and caulked there her top sides and waterways, and she arrived at San Francisco on the 7th June, having had fine * weather all the way from Valparaiso. [* 351] But it is proved that the soap could not have been injured from any leaks in her top sides or waterways, as the tiers of boxes next to them on either side were in a better condition than those which had been piled further off. These dates show that the ship had not a longer passage to Valparaiso than is usual at the time of year when she was making it; also, that it had been made through different latitudes, without encountering any great continuous heats—certainly not such as could have had the effect to displace or shrink the caulking of the deck into leaking, which is not denied.

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to have been good and tight when the ship left Liverpool. It is not probable that such an exposure for so short a time had forced her deck seams. Besides, it has not been shown by any reliable testimony that there had been, at any time when the ship was on her way to Valparaiso; any leaking from her deck, or any such afterwards, until her arrival in San Francisco, from which by any possibility the soap could have been injured in the way and to the extent it was represented to have been by some of the witnesses, who expressed the opinion that there had been leaks in the deck of the ship, through which salt water had leaked upon the soap. Indeed, it appears to us that all of the witnesses who said so, did it rather by way of inference from the caulking which another witness said had been done to the ship, and from the condition in which the soap was, than from an examination of the ship. The witness, Goodsell, more relied upon than any other witness to prove the leaks in the deck, does not do so satisfactorily from the usual examination made by shipwrights when they are called upon to ascertain such a fact. He says: "I found the poop deck, lately caulked, leaking on larboard side—six on starboard and one seam about half on the starboard side, to main deck. I *should think* that the water-way seams, plank-shear seams, and one or two seams inside to main deck, or main deck, *looked* as if water had run down into the hold of the ship on both sides." He adds, he went into the hold of the ship and examined the under part of the deck. "I saw *indications* of the deck having leaked in the wake of the seams I have [* 352] been speaking of; *they looked* as if they had leaked * all along, but more abaft than forward of the main deck."

This is very uncertain testimony; more of opinion than fact in it, even as to the caulking of which he speaks, and the result of all that he says concerning the seams below the deck, has more of inspection in it than of examination. The difference between them will readily be recognized from the positive language of two other witnesses, who say they examined the seams of the deck below with their knives, and found them hard; one of them adding, it is impossible for a man to tell, after two or three weeks, whether a vessel is newly caulked, without trying her seams. Lowry, the stevedore who discharged the cargo, upon being asked if he had seen any traces of salt water in the top of the boxes of the soap, or on the ceiling of the deck, answers that he had not, but that he saw some places marked with chalk by some persons; that he tried them with his knife, and found them perfectly tight. Such is the testimony in the case, concerning the charge in the libel that the soap had been damaged by leaks in the deck of the ship, which

her captain had neglected to have caulked. In our opinion, it is altogether insufficient. Noyes, the port warden, who surveyed the ship, says he could find no leaks over or above where the soap was, that he could discover. He also saw no traces of the deck having been recently caulked. Indeed, there is not a witness who has said that there were leaks in the deck. Several express the opinion that there were, from the discoloration of the boxes on them outside, and from that of the soap in them. Goodsell ventures further than any other witness, to cause such an impression; but his language is: "I should think," and it "looked" to him as if water had run down into the hold from the waterway seams, the plank-shear seams, and one or two seams inside, to deck or main deck. This conjectural way of speaking by a witness must yield to the positive declarations of Nicholson, Lowry, and Noyes.

Having determined that the soap had not been injured by bad stowage or leaking from the deck, we will now briefly state to what causes its altered condition should be attributed. We have concluded that its discoloration and dampness are to be found in the acknowledged facts and proofs in the cause. The *shipment was made at Liverpool on the 21st June, and [* 353] was on board of the ship for a year, less fourteen days. After the shipment and stowage, the ship remained all of the summer at the dock in Liverpool. She sailed on the 26th of September. From that time the ship's hatches were closed until her arrival at Honolulu, in February. They were then opened for the purpose of discharging a part of the cargo which had been shipped for Honolulu. To do that it was necessary to remove about three hundred boxes of the soap from their stowage, and to land them. They were taken to the ship, restowed as they had been at first, and it does not appear by any evidence that it had been perceived at Honolulu by any one that this upper tier so removed had been injured, or that the boxes had then any appearance of water having leaked upon them. The ship sailed from Honolulu and arrived at San Francisco on the 7th June. From the day of her sailing, the 26th September, she was at no time within such a temperature of heat as would of itself have impaired the quality of the soap. From England, in 10° north of the equator, the average temperature from the time of her sailing is 62°. Ten degrees north and south of the equator the average temperature for the months of September and October 81°.

The average temperature in November is about 41°, and that of Valparaiso is about 62°. These averages of temperature are taken from the most approved charts, and are decisive that the soap has

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not been injured by the temperatures through which the ship passed on her passage to Valparaiso. From that port the ship came to Honolulu, a distance not much short of six thousand miles, in the most favorable weather, without encountering heavy seas or head winds. She made that distance in the usual time, forty-five or fifty days. Honolulu is in the latitude of $21^{\circ} 19'$ north, longitude $157^{\circ} 52'$ west. Nor are the temperatures such between Valparaiso and Honolulu as could have produced any change in the condition of the soap. From Honolulu the usual run to San Francisco is from fifteen to twenty days. As a general rule, the course of ships bound from the first to San Francisco would be to the northward of it, to be sure of good winds. In the absence, then, of [* 354] other * probable causes, to account for the change in the quality of the soap, we must resort to the proofs on the record, and from them we have concluded that the soap was injured by the temperature of the ship's hold, or what is called the sweat of the ship, which no mode of ventilation, consistent with safe navigation, has yet been thought sufficient to prevent. In this particular the ship was not more liable from defective construction to this vapor than merchant vessels ordinarily are. Her hatchways were good, the covers for them are not complained of, her hatchbars and tarpaulings were sufficient, or they are not denied to have been so; and it has not been suggested that they were not all applied to cover the hatchways, and to protect the cargo from seawater and rain. Nor is this sweat in ships any mystery to practical seamen. They term it to be vapor emitted from the mixed cargoes of ships by the heat of the hold of a ship, cast off sometimes only in fumes, at other times in steam, which shows itself in the latter case sometimes in drops of water in the same way as rain is produced from vapor. Several of the witnesses—all of them were accustomed to the sea—say, that the sweat of this vessel caused the discoloration of this soap. Besides, it was a second-class article, differing originally in color from a first-rate article of the same kind. It is true that the chemist who analyzed it says that it had been made of good materials, and was well saponified, and he says that sweat is a mere *evolution* of water in a state of vapor; and that the boxes could not have been stained in that way, and that they were stained by some external means. But the proofs in the case show that there was no leakage in the deck by which water could have passed upon them; it must yield to the declarations of those witnesses better acquainted than he is, from their professional acquaintance with the effects of the sweat of the soap upon these cases. We unhesitatingly ascribe the discoloration and damp-

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ness of the soap to the rocking of the ship, the nature of the compound of soap, and to the long agitation of the soap in the boxes to which it had been subjected in a boisterous passage. The de-vaporation of water from the vapor of the soap itself, with which it is cleansed in the making, heated by the sweat of the ship, would be * concentrated in the boxes, upon the soap, [* 355] and would discolor it and make it damp, without any sensible diminution of its weight; and we are confirmed in this conclusion by the witnesses who examined and weighed it, having testified that the boxes were of the same weight marked upon them when they were shipped at Liverpool. We feel bound to notice one point made in the argument of the cause by the counsel of the appellees, which is not an open question in this court. It was, that the appellants had no legal title to maintain their libel. In the case of *Houseman v. The Schooner "North Carolina,"* (15 Pet. 49,) the same objection was made. This court said: "An objection has been taken to the right of the appellee to sue in his own name, as agent for the consignees, or to sue at all, as his power of attorney from them bears date after the libel was filed; and it is also objected, that J. & C. Lawton, the consignees, had no right to institute proceedings to recover more than their proportion of the cargo shipped on their own account. No authority has been produced in support of these objections, and we consider it as well settled in admiralty proceedings, that the agent of absent owners may libel, either in his own name, as agent, or in the name of his principals, as he thinks best; that the power of attorney, subsequent to the libel, is a sufficient ratification of what he had done in their behalf, and that the consignees have such an interest in the whole cargo; that they may proceed in this case, not only for what belonged to them and was shipped on their account, but for that portion also which was shipped by Porter, as his own, and consigned to them." The same conclusion was repeated in *17 Howard, Lawrence and Minturn*, without any qualification, as we understand that case. In the first as well as in the second of these cases, the point was put on the interest which a consignee has in the consignment, as consignee, and not as owner of any part of it; that, from the nature of the contract of a bill of lading, the consignee had a right to sue, in a court of admiralty, for any breach of it. Whatever may be the uncertainty concerning the consignee's right to sue in a court of law, from the conflicting decisions to be found upon that right, there are none that he may sue in a court of admiralty in the United States. * When that case, however, occurs in this court, [* 356] it will be decided; and we now merely remark that, from

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our examination of most of the cases in the common-law reports, upon the facts of those cases, we have been brought to the conclusion that there is no rule of general application as to when the consignor or consignee should bring the suit at common law, but that it will always be important to consider in whom the right of property, and sometimes in whom the right of possession, was vested at the time of the breach of the contract or neglect of duty which is complained of.

We direct the affirmance of the decree from which this appeal was taken.

Mr. Justice NELSON dissented.

THE UNITED STATES, Plaintiff in Error, v. THE CITY BANK OF COLUMBUS.

21 H. 356.

BANKING RULES—AUTHORITY OF CASHIER.

The cashier of a bank wrote to the secretary of the treasury, authorizing one of the directors, as agent of the bank, to contract for the transfer of money from New York to New Orleans. Held, that such an authority was not within the ordinary power of the cashier alone, and that as no act of the board of directors nor any rule of the bank had given such authority, the contract was not binding on the bank. The special circumstances under which the letter was written fully considered.

WRIT of error to the circuit court for the southern district of Ohio. The case is fully stated in the opinion.

Mr. Hull and *Mr. Black*, attorney general, for the plaintiffs.

Mr. Stanbery, for defendant.

[* 360] * Mr. Justice WAYNE delivered the opinion of the court.

The only question arising on this record is, whether the court erred in so much of the charge to the jury as is set out in the bill of exceptions. Objections were taken in the course of the trial to testimony, but no exceptions were taken to the rulings of the court upon them. The declaration in the case contained two counts—one of them alleging that a contract had been made between the City Bank of Columbus and the United States, by which the bank agreed, on the 1st November, 1856, to transfer one hundred thousand dollars of the public money from New York to New Orleans by the first of January, 1851, free of charge; and the other account

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for money had and received by the bank for the use of the United States.

The charge given by the court was confined to the first count. The bill of exceptions sets out the following evidence, which was introduced by the United States to show a contract with the bank.

The following letter was written by the cashier of the bank:

CITY BANK OF COLUMBUS,
Columbus, Ohio, 26th October, 1850.

SIR: The bearer, Colonel William Miner, a director of this bank, is authorized, on behalf of this institution, to make proposals for the purchase of United States stocks to the amount of one hundred thousand dollars. He is also authorized, if consistent with the rules of the treasury department, to contract, on behalf of this institution, for the transfer of money from the east to the south or west, for the government.

I have the honor to be, sir, your obedient servant,

THOMAS MOODIE, *Cashier.*

HON. THOMAS CORWIN,

Secretary of Treasury, Washington City.

This letter was presented by Mr. Miner to Mr. Corwin on the first of November, 1850. On the same day Mr. Corwin wrote to Mr. Miner the following letter:

*TREASURY DEPARTMENT, *November 1, 1850.* [*361]

SIR: Your proposition of this date, to transfer \$100,000 from New York or Philadelphia to New Orleans, by the 1st January next, free of charge to the department, is accepted. You will receive herewith a transfer draft on the assistant treasurer at New York, in favor of the assistant treasurer at New Orleans, for \$100,000, with the authority endorsed to make the payment at New York to you.

I am, very respectfully,

THOMAS CORWIN, *Secretary.*

This was followed by an undertaking for the transfer of one hundred thousand dollars for the government from New York to New Orleans:

WASHINGTON CITY, *November 1, 1850.*

This will certify that I have contracted with the United States treasury, as the agent of the City Bank of Columbus, to transfer \$100,000 from New York to New Orleans, to be deposited in the treasury at the latter-named city by the first day of January, 1851,

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free of charge. I have, in pursuance of said contract, this day received a draft in my own hand for one hundred thousand dollars on the treasury at New York city, which is to be accounted for in said contract.

WILLIAM MINER.

Miner received the draft, and cashed it in person on the 2d November, 1850; but what he did with it no one knows, or this record does not show. It is certain that it was not repaid in New Orleans according to the contract; and there are no proofs on this record which can raise a presumption that the Bank of Columbus ever received a dollar of it. There is proof that Miner was all that time a director of the bank, and that Moodie, who gave him the letter to the secretary of the treasury, was the cashier, and that he signed his name to the letter as cashier; and that the letter had been copied into the letter book of the bank. A by-law of the bank was also put in proof, to show that it might be inferred from it that he had authority, as cashier, to empower Mr. Miner, as a director of [* 362] * the bank, to enter into such a contract as he had made with the secretary of the treasury. The by-law is: "A committee of two shall be appointed every six months to advise with the president and cashier. In their absence, all the ordinary business of the bank may be done by the president and cashier; and if either of them be not present, then by the other alone; but any discount, negotiation, or contract, whether made by the board or committee, is to be done by the consent of all present."

It was also shown that there had not been a meeting of the directors in either July or August, 1850. That there had been a meeting on the 21st September, 1850, and another November 4th, 1850, nine days before the cashier gave his letter to Miner, and three days after the date of Miner's contract, to transfer the money from New York to New Orleans. The minutes of the bank, as kept by the cashier, of the meetings of the directors, do not show any intention upon the part of the directors to enter into a contract for the purpose of buying stock of the United States, or for the transmission of the money of the United States from the east to the south or west, as Moodie expresses it in his letter; or that after the negotiation of Miner, and his receiving the money from the assistant treasurer in New York, that the directors or president of the bank had any knowledge of the transaction until after Miner's default to pay the amount at New Orleans. Moodie testifies that he wrote the letter of the 26th of October, 1850, for Miner to negotiate with the secretary of the treasury, without the knowledge of the president or any of the directors of the bank, except Miner himself,

and that the fact that such a letter had been written was not communicated by him to any of the directors until January after, though he had caused a copy of it to be put in the letter book. All of the directors, at the time of the transaction, have sworn that Moodie had not been authorized by the board or by any of themselves to constitute Miner such agent; that they had no knowledge of Moodie's letter, and that they never sanctioned the same. And there is other testimony in the case, that Moodie, as cashier, had not the power to depute Miner for any such purpose, and that it * would not have been done but by a resolution [*363] of the board of directors. Upon this evidence, and some other which it is not material to notice, the court charged the jury. After they had retired, and consulted for some time, they came into court and asked for further instructions, and the court gave them the following charge in reference to the contract set out in the first count of the declaration: "That if they should find that the letter written by Moodie was his own act, and had been given without the knowledge or authority of the board of directors, or any of them individually, except Miner, and that the agency of Miner was not constituted by or known to the board of directors, or the directors individually, or any of them except Miner, but was the act of the cashier alone; and if they should find that Moodie had no power as cashier, except such as belonged to the office of cashier generally, or such as are given by the charter or by the by-law or other law or usage of the said bank, that the defendant was not concluded by that letter, and is not bound by the contract made by Miner, without some subsequent ratification of the same, though the secretary had, in contracting with Miner, relied upon it as the act of the bank."

To this charge the plaintiff excepted, and, on account of that exception alone, the case has been brought to this court by writ of error. In our opinion, no charge could have been more comprehensive of the merits of the case, more precise in its application to the particulars of the testimony introduced by the plaintiff and the defendant, or more expressive of what the law is upon such a state of facts. It is all that the litigants could have expected, and is liberal to both. It is also in coincidence with the views generally entertained of the powers and duties of the cashiers of banks, by those most familiar with the management and business of banks, and perfectly so with such as have been expressed by this court in previous reported cases. In *Fleckner v. The Bank of the United States*, (8 Wheat. 338, 356, 357,) this court said, the charter authorizes the president and directors to appoint a cashier and

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other officers of the bank, and gives the president and directors, or a majority of them, full power and authority to make [* 364] all such rules and regulations * for the government of the affairs and conducting the business of said bank, as shall not be contrary to the act of incorporation. It contains no regulations as to the duties of cashiers; with the directors it would rest to fix the duties of cashier or other officers. Whether they have made any regulation upon this subject, does not appear; but the acts of the cashier, done in the ordinary course of the business actually confided to such an officer, may well be deemed *prima facie* evidence that they fell within the scope of his duty. In the case *Bank of the United States v. Dunn*, (6 Peters, 51,) the court would not permit the president and cashier of the bank to bind it by their agreement with the endorser of a promissory note, that he should not be liable on his endorsement. It said it is not the duty of the cashier and president to make such contracts, nor have they power to bind the bank, except in the discharge of their ordinary duties. All discounts are made under the authority of the directors, and it is for them to fix any conditions which they may think proper in loaning money. The court defines the cashier of the bank to be an executive officer, by whom its debts are received and paid, and its securities taken and transferred, and that his acts, to be binding upon a bank, must be done within the ordinary course of his duties. His ordinary duties are to keep all the funds of the bank, its notes, bills, and other choses in action, to be used from time to time for the ordinary and extraordinary exigencies of the bank. He usually receives directly, or through the subordinate officers of the bank, all moneys and notes of the bank, delivers up all discounted notes and other securities when they have been paid, draws checks to withdraw the funds of the bank where they have been deposited, and, as the executive officer of the bank, transacts most of its business.

The term ordinary business, with direct reference to the duties of cashiers of banks, occurs frequently in English cases, and in the reports of the decisions of our State courts, and in no one of them has it been judicially allowed to comprehend a contract made by a cashier, without an express delegation of power from a board of directors to do so, which involves the payment of money, unless it be such as has been loaned in the [* 365] * usual and customary way. Nor has it ever been decided that a cashier could purchase or sell the property, or create an agency of any kind for a bank which he had not been authorized to make by those to whom has been confided to power to man-

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age its business, both ordinary and extraordinary. The case of *Kirk v. Bell*, (12 English and Common Law Reports, 389,) and that of *Hoyt v. Thompson*, were very appropriately cited by the counsel of the appellee, in this connection; and we think the safe rule in all instances of acts done by the officers of corporate companies, or by those who have the management of their business, from which contracts are alleged to have been made, is, to test that fact by an inquiry into the corporate ability which has been given to them and to their subordinate officers, or which the directors of the company can confer upon the latter to act for them. Such was the view of this court when it decided, in the case of the Bank of the United States v. Dunn, (6 Peters,) that a release given by its president and cashier to the endorser of a promissory note of his liability upon it, did not bind the bank, neither nor both having any authority to make contracts of that kind. The case before us is one in which a cashier acts alone, and in which he testifies that he did so without any consultation with the president or directors of the company, and of which they had no information from him of the transaction until after the failure of Miner to pay the money in New Orleans. The act under which the City Bank of Columbus became a corporation does not, in any part of it, give any power to a cashier to act independently of the directors. No specific power is given to the directors to appoint a cashier. In the general power given to the directors to appoint officers to do the ordinary business of the bank, they have an authority to appoint a cashier, and such an appointment is a limitation of that officer's executive function in doing the business of the bank. It cannot be pretended that the directors, as a whole, or any one of them, except Miner, consented to the cashier's designation of Miner for any such purpose as was concluded between them, to induce the secretary to believe that Miner was the agent of the bank, either to buy stock of the United States or to enter into * contracts for [* 366] the transmission of money, free of charge, to those posts where the United States should designate it to be put. Such a power in the secretary of the treasury is a necessary one for the transaction of the business of the government, pervading, as it does, every part of the country. The exercise of it, however, requires great care and caution in the selection of agents for such a purpose, and no authority short of the most certain should be taken to establish the representative character of any one for a private company or corporation to enter into such a contract with the secretary.

The United States, as plaintiff in this action, has failed to establish the contract which it alleges in its declaration had been made

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with the City Bank of Columbus, for the transmission of money; and we direct the judgment given in the court below to be affirmed.

21 H. 366
L. ed. 149
1310xx11

THE PEOPLE OF THE STATE OF NEW YORK, at the relation of Cutler and others, v. EDGAR C. DIBBLE, County Judge of Genesee County.

21 H. 366.

CONSTITUTIONAL LAW—RIGHTS OF INDIANS.

1. The supreme court of the State of New York decided that the statute of that State which forbids any other than Indians to settle on an Indian reservation, and authorized a summary proceeding for their ejection, is constitutional. Held, by this court, that it was a police regulation, and a proper subject of State legislation, not in conflict with the federal constitution or any act of Congress.
2. That though the relators secured a title under the State of Massachusetts to the land, this act of the States did not violate the contract of purchase of Ogden and Fellows, because no right of possession under that contract accrued until the United States saw fit to remove or compel the removal of the Indians. *Fellows v. Blacksmith*, 19 How. 366; 1 Miller, 763.

THIS was a writ of error to the supreme court of the State of New York. The case in that court is reported in 16 New York Reports, 203.

The facts are fully stated in the opinion.

Mr. Brown and *Mr. Gillet*, for plaintiffs in error.

Mr. Martindale, for defendant.

[* 368] * Mr. Justice GRIER delivered the opinion of the court.

This case is brought before us by a writ of error to the supreme court of New York, under the 25th section of the judiciary act. It had its origin in a proceeding before the county judge of Genesee county, instituted by the district attorney against Asa Cutler, John Underhill, and Arza Underhill, the relators, pursuant to the provisions of an act of assembly entitled "An act respecting intrusion on Indian lands," passed March 31, 1821.

This act made it unlawful for any persons other than Indians to settle and reside upon lands belonging to or occupied by any tribe of Indians, and declared void all contracts made by any Indians, whereby any other than Indians should be permitted to reside on such lands; and if any persons should settle or reside on any such lands contrary to the act, it was made the duty of any judge of any county court where such lands were situated, on complaint made to

him, and due proof of such residence or settlement, to issue his warrant, directed to the sheriff, commanding him to remove such persons.

* On notice to the relators of the institution of this proceeding, they appeared before the judge and pleaded to his jurisdiction, on the ground that they had entered and occupied the lands, claiming title under a written instrument adversely to the Seneca nation of Indians, and therefore, by the constitution and laws of the State, they were entitled to a trial by jury, according to the course of the common law, and could not thus be removed by summary proceedings under this act.

This plea was overruled by the judge. The relators then pleaded that this tract of 12,800 acres, called the Tonawanda reservation, was not owned by the Seneca Indians; that by a treaty made with the United States on the 20th of May, 1842, the Seneca nation of Indians had by indenture set forth in the treaty conveyed to Thomas Ludlow Ogden and Joseph Fellows this tract of land, with others; that this grant was duly confirmed by the State of Massachusetts, pursuant to the provisions of the act of cession made between that State and the State of New York, on the 16th of December, 1786; that the whole amount of the consideration stipulated by the treaty and deed had been paid by said Ogden and Fellows; and that relators were in possession under said Ogden and Fellows, and adversely to the Indians. They therefore denied the power and authority of the judge to determine their right to the lands in their possession, or to remove them, under the powers conferred by the act of assembly of New York.

After hearing the parties, the judge decided against the relators, who removed the proceedings by *certiorari* to the supreme court.

The record contains the testimony on both sides, and numerous documents concerning the treaty with the Seneca Indians, and also the subsequent proceedings by the officers of the government. It will not be necessary to a clear apprehension of our decision in this case to state them particularly, nor is it material to our inquiry whether the judge may have erred in his decision, that "the Seneca nation had not duly granted and conveyed the reserve in question to Ogden and Fellows."

The supreme court and court of appeals of New York have decided, "that the provisions of this act respecting intrusions * on Indian lands, which authorize the summary [* 370] removal of persons, other than Indians, who settle or reside upon lands belonging to or occupied by any nation or tribe of Indians, are constitutional, and that a citizen who enters upon their

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land before their title has been extinguished, and they have removed, or have been removed by the act of the government, can acquire no such right of property or possession as is within the protection of the provisions of the constitution which secure a trial by jury." They therefore affirmed the judgment of the county judge.

The only question which this court can be called on to decide is, whether this law is in conflict with the constitution of the United States, or any treaty or act of congress, and whether this proceeding under it has deprived the relators of property or rights secured to them by any treaty or act of congress.

The statute in question is a police regulation for the protection of the Indians from intrusion of the white people, and to preserve the peace. It is the dictate of a prudent and just policy. Notwithstanding the peculiar relation which these Indian nations hold to the government of the United States, the State of New York had the power of a sovereign over their persons and property, so far as it was necessary to preserve the peace of the commonwealth, and protect these feeble and helpless bands from imposition and intrusion. The power of a State to make such regulations to preserve the peace of the community is absolute, and has never been surrendered. The act is therefore not contrary to the constitution of the United States.

Nor is this statute in conflict with any act of congress, as no law of congress can be found which authorizes white men to intrude on the possessions of Indians.

Is it in conflict with rights acquired by Ogden and Fellows, under the treaty, and contract making a part of it? If the treaty of 1842 had been executed; if the United States, in their character of sovereign guardian of this nation, had delivered up the possession to these purchasers, then this statute of New York, when applied to them, would clearly be in conflict with their rights acquired under the treaty. But, by the case, it is admitted that the [*371] Indians have not been removed by the United *States.

The Tonawanda band is in peaceable possession of its reserve, and has hitherto refused to surrender it. Unless, therefore, these persons claiming under Ogden and Fellows have by the treaty a right of entry into these lands, and, as a consequence, to forcibly oust the possessors or turn them out by action of ejectment, they cannot allege that this summary removal by authority of the statute of New York is in conflict with the treaty, or any rights secured to the purchaser under it. This proceeding does not affect their title. The question of the validity of this treaty to bind the Tonawanda

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band is one to be decided, not by the courts, but by the political power which acted for and with the Indians. So far as the statute of New York is concerned, it only requires that the Indians be in possession; they are not bound to show that they are owners. They may invoke the aid of the statute against all white intruders, so long as they remain in the peaceable possession of their lands.

The relators cannot claim the protection of the treaty, unless they have a right of entry given them by it, before the Indians are removed by the government. This court have decided, in the case of *Fellows v. Blacksmith*, (19 Howard, 366,) that this treaty has made no provision as to the mode or manner in which the removal of the Indians or the surrender of their reservations was to take place; that it can be carried into execution only by the authority or power of the government which was a party to it. The Indians are to be removed to their new homes by their guardians, the United States, and cannot be expelled by irregular force or violence of the individuals who claim to have purchased their lands, nor even by the intervention of the courts of justice. Until such removal and surrender of possession by the intervention of the government of the United States, the Indians and their possessions are protected, by the laws of New York, from the intrusion of their white neighbors.

We are of opinion, therefore, that this statute and the proceeding in this case are not in conflict with the treaty in question, or with any act of congress, or with the constitution of the United States. The judgment of the court of appeals of New York is therefore affirmed, with costs.

THE STEAMSHIP PACIFIC.

THE NEW YORK AND LIVERPOOL MAIL STEAMSHIP COMPANY, Appellants, v. OTIS P. RUMBALL.

21 H. 372.

ADMIRALTY—COLLISION.

1. When a sail vessel and a steamer are approaching each other, it is the duty of the former to hold on her course and of the latter to keep out of her way.
2. These rules are binding on both vessels, from the time of possible collision until such possibility is passed, or until there is no chance of avoiding danger by that course.
3. As the steamer is bound to keep out of the way, and it devolves upon her to shape her course and adopt other means for the security of both vessels, it is necessary, to enable her to do this, that the sail vessel should steadily hold on her course.
4. The controversy in this case is on the question whether the sail vessel did not depart

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from this rule, improperly changing her course; and the court finds from the evidence that she did not, and that the steamer is responsible for the collision.

APPEAL from the circuit court for the southern district of New York. The case is fully stated in the opinion.

Mr. Potter, for appellants.

Mr. De Forest, for appellee.

[* 374] * Mr. Justice CLIFFORD delivered the opinion of the court.

This is an appeal in admiralty, from a decree of the circuit court of the United States for the southern district of New York, in a cause of collision, civil and maritime. It was commenced in the district court on the twenty-fourth day of September, 1851, by the appellee, in behalf of himself and the other owners of the brig "Alfaretta." According to the case made in the libel, the Alfaretta sailed from Millbridge, in the State of Maine, on the tenth day of August, 1851, fully laden with lumber on freight, and bound on a voyage to the port of New York. She was a tight, stanch, strong vessel of one hundred and sixty-three tons burden, and in every respect well manned, tackled, appareled, and appointed, with a competent master, and sufficient crew; and was totally wrecked by the collision, which occurred on the sixteenth day of the same month, without any fault of her officers or crew, and while she was lawfully pursuing her voyage from the place of departure to her place of destination. At the time of the disaster she was fifteen or twenty miles off the southern shore of Long Island, sailing close hauled on the wind, with her larboard tacks aboard, and all her sails set, and was heading about northwest by west. While sailing on that course, with a light wind from southwest by west, her master and crew discerned a light bearing from them about west half south, which they judged to be light of a steamer;

and the libellant, who was the master of the Alfaretta, immediately caused a light to be hoisted in * the fore rigging of the brig. That vessel proved to be the steamship Pacific, and it is alleged that she had such a large number of lights that the libellant was not able to determine what direction she was steering, and kept his vessel on her course, without any deviation, until the collision took place. It occurred between eight and ten o'clock in the evening, as alleged in the libel, and about fifteen minutes after the light was placed in the fore rigging of the brig, when the steamer, with great force and violence, ran into and struck the brig on her larboard bow, cutting her down to the water's edge,

and carrying away her foremast, so that she filled in a few minutes and became a complete wreck.

On the fourteenth day of October following, the claimants of the steamer filed their answer to the allegations of the libel. Among other things not necessary to be noticed, they deny that the steamer had such a large number of lights at the time referred to, that the libelant was not able to determine what direction she was steering; and they also deny that the brig kept her course, without any deviation, until the collision occurred; or that the steamer ran into and struck the brig in the manner above stated. Their theory is, and they accordingly allege that the steamer started from New York on the day of the collision, on her intended voyage to Liverpool, well manned and equipped for the voyage, and in every respect seaworthy; and that the look-out of the steamer, who was stationed at the forecastle, while she was proceeding on the voyage, between seven and eight o'clock in the evening, the weather being cloudy and the night dark, the wind southwest by south, and the steamer steering east half south, with her usual lights displayed, discovered the light of a vessel about two and a half points on the starboard bow of the steamer. Whereupon the helm of the steamer was immediately put to the starboard, and she at once swung off to east-northeast, and at or about the same time her engines were stopped. That vessel so discovered was the brig *Alfaretta*. She was close hauled on the wind at the time, and was steering to the westward, as the respondents allege, in a course nearly parallel to that of the steamer; but, instead of keeping her course, as she should have done, * she suddenly and unexpectedly [* 376] put her helm to port, and kept off, and came with her bows on to the steamer, striking her a little forward of her starboard wheel, which passed over the bows of the brig, cutting her down and damaging the steamer to the amount of two thousand dollars. And they explicitly allege, that if the brig had kept her course, and had not put her helm to port, the collision would have been avoided. This statement, derived from the pleadings, exhibits very fully the real nature of the controversy between the parties, and the grounds assumed on the one side and the other in the prosecution and defense of the suit. Testimony was taken on both sides, in the district court, and, after hearing, a decree was entered that the libel be dismissed, each party paying their own costs, and the libelant appealed to the circuit court. Both parties appeared by counsel in the circuit court, and, after a full hearing, it was ordered and adjudged that the decree of the district court dismissing the libel be in all things reversed, and that the libelant do recover the

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damages sustained by reason of the collision, together with costs in both courts, and that the cause be referred to a commissioner to ascertain and report the damages. Additional testimony was taken before the commissioner, who reported that the sum of seven thousand one hundred and seven dollars and nineteen cents was due to the libelants, to which report the respondents excepted; and, after the hearing upon the exceptions, the report was confirmed by the court, and a decree entered that the libelant recover the sum reported with costs. Whereupon a final decree was entered, in pursuance of the report, and the respondents appealed to this court. Many of the facts and circumstances attending the disaster, as well as those which preceded it, are so fully proved that they cannot properly be regarded as the subject of dispute. As alleged in the libel, the collision took place in the open sea, on the sixteenth day of August, 1851, some fifteen or twenty miles off the southern shore of Long Island. It occurred a little past eight o'clock in the evening, after the officers in charge of the respective vessels had been fully apprised of the approaching danger, and under circumstances which make it manifest that it ought to [* 377] have been prevented. Both vessels had proper lights at the time, and competent and sufficient look-outs; and it is clearly proved that the duties of the look-outs were vigilantly and promptly performed. Lights had not been set on the brig when her look-out first discerned the light of the steamer from the forward part of the vessel. One had been prepared, however, and lighted by the steward, and was in the galley forward of the house on the deck, ready for that purpose. On seeing the light of the steamer, the look-out of the brig at once reported the fact to the master, who was then walking the deck, and he immediately caused the light, which was burning brightly, to be hoisted in the fore rigging of the brig, and it was kept there, in full view of the approaching steamer, until the vessels came together. Coffin, who hoisted the light, and was the look-out on the brig, testifies that he tied the light just under the fore-yard, and remained standing in the rigging, watching the light of the steamer as she approached, until she was so near that he had just time to descend to the deck and take a few steps aft when the vessels struck. He says it was about fifteen minutes after he reported the light of the steamer to the master of the brig that the collision occurred; and, in this particular, he is strongly confirmed by the mate of the steamer, who admits that the brig was about three miles distant when her light was reported to him, as the officer of the deck, by the look-out on the starboard bow of the steamer. At the time the light of the

steamer was first seen by the look-out, the brig was sailing on a course of northwest by west, close hauled on the wind, with her larboard tacks aboard, and all her sails set. She was converging towards the track of the steamer, and was going through the water only three or four miles an hour, the wind being light, and blowing from the southwest by west.

Several witnesses describe the character of the night as overcast, and some speak of it as cloudy, with intervening stars; but all agree that it was not unusually dark. They all concur in saying that the surface of the sea was smooth, and there was no haze or mist on the water; and the mate of the steamer testifies that objects could be seen without lights at the distance of three miles.

* When the steamer discovered the brig, she had all [* 378] her signal lights displayed, and was on a course of east half south, and was moving through the water at the rate of twelve or thirteen miles an hour, using all her sails as well as her engines. Her mate and look-out first saw the light of the brig, and they testify that the bearing of the light was some two and a half points off the starboard bow of the steamer. Their statements, however, do not entirely agree with the testimony of the master. He was in his room at the time, calculating the position of the steamer, and did not hear the light of the brig reported. While there, he heard the mate call out, "hard a-starboard," and instantly went up on to the paddle-box of the steamer.

His account of the bearing of the brig is not entirely clear, as given in the record, or very satisfactory. At first, he says he saw the brig two and a half to three points off the starboard bow of the steamer, but finally fixes it at two points; and adds, to the effect that she was not over one-third of a mile distant. He admits, however, that the steamer was then swinging off rapidly towards Long Island shore; and of course, if the bearing was only two points when the master reached the paddle-box, it must have been much less than two and a half points at the time the light was first discovered, as the vessels were then three miles apart, and the order of the mate, to starboard the helm, had not then been given; and of course the steamer did not commence to swing off to port till after that order was given and executed.

According to the testimony of the mate, his first order, after seeing the light of the brig, was to starboard the helm, and then, he says, the vessel began to swing off; and it was not until after he left the position he then occupied, and went on to the paddle-box, that he gave the order, hard a-starboard. After that order was given, and the usual response received from the wheelsman,

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then, he says, the master came by his side, and repeated the order, adding that "the vessel will be into us—stop her;" and the mate says that the steamer had then swung off about three points; and yet the master says that the bearing of the light of the brig was still two points off the starboard bow of the steamer.

[* 379] *Statements so conflicting and uncertain do not furnish any definite elements which can safely be made the basis of a reliable mathematical calculation as to the precise bearing of the brig when her light was first seen, and are not entitled to much consideration in determining the question how the collision was produced.

Some uncertainty also exists as to the precise bearing of the steamer when her light was first discovered from the brig. It is stated in the libel as about west half south, and the testimony of the witnesses is equally indefinite. One witness estimates it at about three points off the larboard bow of the brig; another says it was about two points in the same direction; and a third witness says it was about west. Such indefinite statements cannot afford much aid in determining the principal question involved in this controversy.

Whatever may have been the precise position of the vessels with respect to each other at the time the light of the steamer was first discovered by the look-out of the brig, it is certain that the course of the brig was converging towards the track of the steamer, and that they came together in the course of fifteen minutes after the light was reported to the master; and the brig was run down and lost. It was the starboard bow of the steamer which came in contact with the larboard bow of the brig, forward of the fore-swifter, and slewed her round, carrying away her bowsprit, foremast, and main-topmast, and cutting her down to the water's edge; and such was the headway of the steamer at the time, that she swept on for a considerable distance, without any apparent abatement of her speed, notwithstanding her engines were stopped and reversed just before the collision took place.

All the circumstances tend to show that the disaster might have been prevented, and that there was fault somewhere, for which the offending party ought to be held responsible. Both parties appear to have so understood the matter when they made up their pleadings, as well as in the subsequent conduct of the cause.

It is alleged in the libel that the brig kept her course after the light of the steamer was seen, without any deviation, until
[* 380] *the collision occurred. On the part of the respondents, that allegation in the libel is denied; and they allege

that the brig, when her light was first seen, was steering to the westward, close hauled on the wind, and in a course nearly parallel to the steamer; but instead of keeping her course, as she should have done, that she suddenly and unexpectedly put her helm up, kept off, and came with her bows on to the steamer.

Such is the issue, as made up by the parties in the pleadings, and it presents the principal question of fact to be determined by the court.

Our views upon the point cannot be stated in a manner which would be satisfactory to those interested, without some brief reference to the evidence on which they are based.

When the disaster occurred to the brig, her whole company, consisting of seven men, including the master and mate, were on the deck of the vessel, and witnessed the events. Four were examined as witnesses; and the mate testifies that it was the watch of the master, who, being the libellant and one of the owners of the vessel, was not examined. His watch commenced at eight o'clock in the evening, when the preceding watch closed. From six to eight o'clock, the mate had charge of the deck, and he says that the course of the brig at sunset was northwest by west; that she was sailing close hauled on the wind, and continued on the same course until eight o'clock, when he went below. He remained below until he heard a light reported, when he immediately went on deck, and at first saw only one light, but, as the vessel approached nearer, he saw more, and supposed it was a steamer; and he testifies positively that the brig did not change her course, after he went on deck, until the steamer struck her. On his return to the deck, he did not look at the compass, but says the brig was on the wind, with her larboard tacks aboard, and, in his judgment, was going the same course as when he went below.

Three of the seamen were also examined, and their testimony is equally full and explicit, and to the same effect. One of them was the look-out, who first discovered the light of the steamer, and reported it to the master; and the other two, on hearing his report, immediately went on deck, and remained *throughout, watching the light as it approached, and [* 381] with every opportunity to see and observe whatever transpired on the deck of the vessel. Some one or more of them testifies that the master twice gave the order "to keep her full and by," as the steamer advanced, and they all concur that the brig did not change her course, and that no danger was apprehended until just before the collision took place. All must admit that they had ample means of knowledge upon the subject of their testimony; and

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if their statements are incorrect, they must have willfully perverted the truth, which is not to be presumed. Several witnesses, however, examined on the part of the respondents, testify that the brig did change her course before the vessels came together; and among the number is the mate of the steamer, who beyond doubt describes the events truly, as they appeared to him at the time of the occurrence.

His testimony, as it is exhibited in the record, furnishes conclusive evidence that the two vessels were very close together, if not in actual contact, when the supposed change of course was made, and presents some ground of inference that the jib-boom of the steamer, or the rigging connected with the bowsprit, as they swept over the stem of the brig, or pressed against her fore rigging, may have produced the state of things which induced him to think that the brig had ported her helm. At first he said the change was made just before the collision, then immediately before it; but, upon further interrogation, he said it was before the jib-boom of the brig had touched the steamer, and finally added that the brig might have been twice the length of the ship off. All of his statements, however, are based upon the theory that the brig ran into the steamer, when it is satisfactorily shown that the real state of the case was the reverse. It was the bow of the steamer, near the cat-heads, which struck the jib-boom of the brig, and carried it away; and the evidence furnishes strong reasons to conclude that the brig had been partly slewed round just before that occurred. Be that as it may, it is certain from the evidence that the brig kept her course until just before the collision took place. When the mate of the steamer first saw her light, he says it was about three

miles distant, and he admits that her direction then was [* 382] * north of west, and that he did not notice any change of

her course, except the one already mentioned, when the vessels were close together. When the master went up on to the paddle-box of the steamer, and repeated the order previously given by the mate to put the helm hard a-starboard, he says the brig was then sailing close hauled on the wind, and that the two vessels were not more than a third of a mile apart. His account of the change of course is, that it was made after that order was given, and he says the brig instantly turned directly across the bows of the steamer, and came right into her, thus showing conclusively that the alleged change, however produced, was made at the moment of collision. These references to the testimony of the witnesses must suffice, and they are believed to be amply sufficient to show what the state of the evidence is, as it is exhibited in the record. One remark is

applicable to all of the witnesses introduced by the respondents; and that is, they had not the same means of knowledge respecting the matter in dispute as the witnesses for the libellant possessed, who had charge of the brig, and governed her course; and in weighing the evidence, and determining its force and effect, that important consideration cannot be overlooked. It must be admitted that the witnesses on the part of the libellant speak from actual knowledge, and, unless they have willfully stated what they know to be false, their statements must be correct. They were on the deck of the vessel, interested, so far as their personal safety was concerned, to observe everything that transpired as the steamer approached, and they cannot well be mistaken in respect to the matter under consideration.

Those on board the steamer appear in the record under very different circumstances. They only infer what they have affirmed as to what transpired on the deck of the brig, and at best their statements respecting the matters in question are of the nature of opinions, and it is not difficult to see that they may be in error. In the excitement and confusion of the moment, they may have mistaken what was occasioned by the momentum of the steamer or the pressure of her bowsprit or jib-boom upon the stem or fore rigging of the brig, for a change of course * produced [* 383] by an alteration of her helm. All the testimony tends to show that the two vessels came together at an obtuse angle, and there is much reason to think that the brig had been pressed out of her course before the bows of the vessels came together. At all events, such an inference from the evidence is far more reasonable than would be the conclusion that all the witnesses for the libellants have willfully perverted the truth. Other grounds of reconciling the testimony consistent with the integrity of all the witnesses might be suggested, but we think it unnecessary, as the evidence clearly shows that the brig kept her course, without any change whatever, until the peril was impending and the collision inevitable.

An error committed by those in charge of a vessel under such circumstances, if the vessel was otherwise without fault, would not impair her right to recover for the injuries occasioned by the collision, for the plain reason that those who produced the peril and put the vessel in that situation would be chargeable with the error, and must answer for the consequences.

Our conclusion, however, on this branch of the case, is, that the respondents have failed to support the allegation of the answer, that the brig changed her course after the light of the steamer was discovered, and that the evidence satisfactorily shows that she did

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not change her course in any sense which can be regarded as a fault. Sailing vessels when approaching a steamer are required to keep their course; and steamers, under such circumstances, as a general rule, are required to keep out of the way. Many considerations concur to show that all those engaged in navigating vessels upon the seas are bound to observe the nautical rules recognized and approved by the courts, in the management of their vessels on approaching a point where there is danger of collision. Those rules were framed and are administered to prevent such disasters and to afford security to life and property exposed to such dangers; and public policy, as well as the best interest of all concerned, requires that they should be constantly and rigidly enforced in all cases to which they apply. Few cases can be imagined where it is more needful that they should be observed than when a steamer

and a sailing vessel are approaching each other from opposite [* 384] directions, or on intersecting lines, for the obvious reason that the negligence of the one is liable to baffle the vigilance of the other; and if one of the vessels under such circumstances follows the rule, and the other omits to do so, or violates it, a collision is almost certain to follow.

Rules of navigation, such as have been mentioned, are obligatory upon vessels approaching each other, from the time the necessity for precaution begins, and continue to be applicable as the vessels advance, so long as the means and opportunity to avoid the danger remain. They do not apply to a vessel required to keep her course after the approach is so near that the collision is inevitable, and are equally inapplicable to vessels of every description, while they are yet so distant from each other that measures of precaution have not become necessary to avoid a collision. Sailing vessels approaching a steamer are required to keep their course on account of the correlative duty which is devolved upon the steamer to keep out of the way, in order that the steamer may know the position of the object to be avoided, and may not be led into error in her endeavor to comply with the requirement.

Under the rule that a steamer must keep out of the way, she must of necessity determine for herself and upon her own responsibility, independently of the sailing vessel, whether it is safer to go to the right or left, or to stop; and in order that she may not be deprived of the means of determining the matter wisely, and that she may not be defeated or baffled in the attempt to perform her duty in the emergency, it is required in the admiralty jurisprudence of the United States that the sailing vessel shall keep her course, and allow the steamer to pass either on the right or left, or to adopt

such measures of precaution as she may deem best suited to enable her to perform her duty and fulfill the requirement of the law to keep out of the way.

Repeated decisions of this court have affirmed the doctrine here laid down, and carried it out to its logical conclusion, and in so many instances that the question cannot any longer be regarded as open to dispute. Accordingly, it was held in the case of the *Steamer Oregon v. Rocca et al.*, (18 How. 570,) that *when [* 385] a steamer approaches a sailing vessel, the steamer is required to exercise the necessary precautions to avoid a collision; and if this be not done, *prima facie* the steamer is chargeable with fault. That decision was founded upon the rule previously established in *St. John v. Paine et al.*, (10 How. 583,) where the whole subject is elaborately considered, and the reasons of the rule fully explained. Similar views are also maintained in the case of the *Genesee Chief*, (12 How. 461,) and in various other cases to the present time. Exceptional cases may be imagined in a crowded thoroughfare, where the rule would not be applicable, but those will be considered when they arise. Such precautions as are inculcated in the rule referred to are enjoined, as before remarked, to prevent collision and afford security to life and property; and in a case where the rule could not be followed without defeating the end for which it was established, or without producing the mischief which it was the design of the rule to avert, of course it would not be applicable, and in such a case a departure from it would be both justifiable and commendable. Extreme cases, such as are supposed, will rarely if ever occur, and in referring to them it must not be understood that the rule will be relaxed to any extent whatever in other cases to which it properly applies.

Applying these principles to the case under consideration, it is obvious what the result must be. It is not denied that the collision took place, and that the brig was run down and lost; and such being the fact, and the evidence exhibited failing to satisfy the court that the brig was in fault, or the disaster inevitable, it necessarily follows that the collision was the result of fault on the part of the steamer, and that the steamer is answerable to the libellant for the damage.

Our attention was also drawn, at the argument, to the amount of the damage as reported by the commissioner, and it was insisted that it is excessive. On that point it will be sufficient to say, that after a careful examination of the testimony before him, we see no ground to doubt that his duty was rightly performed.

The decree of the circuit court, therefore, is affirmed, with costs.

The Steamer Republic.

THE STEAMER REPUBLIC.

JOSEPH E. MONTGOMERY and others, Appellants, v. JOHN J. ANDERSON and others.

21 H. 386.

FINAL DECREE—APPEALS IN ADMIRALTY.

1. Where, in a contest in the district court for proceeds of a vessel sold under a decree in admiralty, the court decides to allow a particular claim, but makes no order of payment until all claims on the fund are adjusted, this is not such a final decree as authorizes the owner of the vessel to appeal to the circuit court.
2. The circuit court having no jurisdiction, its decree affirming that of the district court, and remanding it to the district court for further proceedings, is erroneous, and must be reversed here, and the case remanded with directions to remit the case from the circuit to the district court for a final decree, from which either party may then appeal.
3. The circuit court cannot remit its decrees in admiralty appeals to the district court for execution, but the *res* must accompany the appeal, and the circuit court must render and enforce its own decree in the case.
4. The parties cannot, by an agreement in this court that there is now a final decree in the district court, give jurisdiction to this court in such a case as this.

APPEAL from the circuit court for the district of Missouri. The case is well stated in the opinion.

Mr. Polk, for appellants.

Mr. Rankin, for appellees.

Mr. Chief Justice TANEY delivered the opinion of the court.

The appellees in this case filed a petition in the district court of the United States for the eastern district of Missouri, stating that they had, by the laws of Missouri, a lien on the steamboat Republic for \$2,000, which they had loaned to the clerk of the boat to purchase supplies and necessities, in order to enable her to proceed on a voyage from St. Louis to New Orleans; that the vessel, at the time the petition was filed, was under seizure in the district, in a case of admiralty and maritime jurisdiction, and had been ordered by the court to be sold; and the petitioners prayed that they might be permitted to intervene for their interest, and paid out of the proceeds when the steamboat was sold.

The appellants answered, stating that they were owners [* 387] of * seven-eighths of the vessel, and denying that the money was needed or used for supplies; and insisting that the boat is not liable for it, and that it is not a lien by the laws of Missouri.

Montgomery v. Anderson.

The petition was filed on the 3d of June, 1857, and the vessel, it appears, was sold by the marshal, upon the seizure mentioned in the petition, and the sale reported and the proceeds paid into the registry of the court on the 23d of the same month. The proceeds amounted to \$26,250. Further proceedings were had on the petition of the appellees, and testimony taken; and on the 7th of September, in the same year, the district court decreed that the sum claimed by the petitioner was due, with interest and costs, and a lien on the Republic, and referred the matter to the commissioner of the court to compute and report the amount due.

The commissioner accordingly made his report, stating the amount due, for principal and interest on the sum loaned, to be \$2,034. This report was confirmed by the court; and thereupon the court passed a decree, adjudging that there was due from the fund then in court, to the petitioners, the sum of \$2,034, and to bear interest from that day; but that, inasmuch as some of the causes against the Republic had not then been determined, and the fund in court might not be sufficient to satisfy all of the claims that might be established against the vessel, no order for the payment of the money would be made by the court until it should be further advised in the premises.

The present appellants thereupon prayed an appeal to the circuit court for the district of Missouri, which was granted; and further proceedings took place in the circuit court, and further testimony was taken. And, at the October term, 1857, the decree of the district court was affirmed, and the case remanded to the district court to carry out this decree; and from this decree the appellants prayed an appeal to this court.

This is substantially the case, as it appears on the transcript from the circuit court. We do not now speak of the admissions filed here, which we shall presently notice. But, upon the transcript itself, it appears that there was no final decree in the district court, upon which an appeal would lie to the circuit court. No final disposition of the fund in the registry. *Indeed, it [* 388]; was not final even as to the amount in controversy between these parties; for the amount to be awarded to the appellees was made to depend upon the amount of other claims upon the fund, which were then depending before the district court. And, under the act of congress, no appeal would lie from the district to the circuit court until there was a final decree upon the whole case—that is, not until all the claims on the money in the registry had been ascertained and adjusted, and the whole amount of the proceeds of the sale of the vessel distributed, by the decree, among

The Steamer Republic.

the parties which the district court deemed to be entitled, according to their respective priorities and rights.

The circuit court, therefore, had no jurisdiction of the case, as it came before them; and their judgment, affirming the decree, was erroneous on that ground. The appeal ought to have been dismissed for want of jurisdiction. This point was directly decided in this court, in the case of *Mordecai and others v. Lindsay and others*. (19 How. 200.)

But if the appeal had been regularly before the circuit court, it was not authorized to remand the case to the district court, to carry into execution its decisions. The appeal carries up the *res*, or money in the registry, of the district court, to the circuit court; and when the rights of the parties are adjudicated there, the court must carry into execution its own decree.

In order to cure these defects in the record, an agreement has been filed in this court, in which they admit that the whole fund has been finally disposed of by the circuit court among the claimants, with the exception of the sum in controversy between these parties. And they move to amend the record here according to this agreement.

But, in the case of *Mordecai and others v. Lindsay and others*, above referred to, a similar motion was made to amend the record here, upon a like agreement. But the court decided that, as the defect of jurisdiction in the circuit court appeared upon the transcript, it could not be cured by an amendment in this court, because consent cannot give jurisdiction, nor legalize jurisdiction exercised without the authority at law. The rule laid down in that case must govern this.

[* 389] *The decree of the circuit court must therefore be reversed, and the case remanded to the court, with directions to dismiss the appeal for want of jurisdiction. The district court can then proceed to pass a final decree, if that has not been already done; and from that decree any party who may think himself aggrieved may appeal to the circuit court, and from the final decree of that court to this, where the sum in controversy is large enough to give jurisdiction to the respective courts upon such appeals.

This view of the subject makes it unnecessary to examine whether the amount in controversy between the parties in this appeal is over \$2,000; for their respective rights have not been judicially decided upon in the circuit court, for want of jurisdiction, as above stated, when it acted upon the controversy.

CHARLES BALLANCE, Appellant, v. ROBERT FORSYTH and others.

21 H. 389.

PRACTICE IN SUPREME COURT—JURISDICTION.

Where a case has been dismissed, because no appeal was taken in the circuit court, it cannot be reinstated by an agreement in writing to waive this right, because such consent cannot give jurisdiction to this court.

APPEAL from the circuit court for the northern district of Illinois.
The matter is sufficiently stated in the opinion.

Mr. Chief Justice TANEY delivered the opinion of the court.

This case was dismissed on the 20th of December last, because it did not appear that an appeal had been taken in the district court. A motion has now been made to reinstate the case, and, in support of that motion, a written agreement, signed by the counsel for the appellant and appellee, has been filed, consenting to reinstate the case, to waive all irregularities, and to try the case on the merits.

But the consent of parties cannot give jurisdiction to this *court, where the law does not give it. And, without [* 390] an appeal taken in the district court, this court has no jurisdiction, and the consent of parties cannot cure the defect. The motion is therefore overruled.

But if the plaintiff in error desires to supply the omission, and take an appeal to the district court, and bring his case legally before us, he has leave, in order to save expense, to withdraw the transcript now filed, and to use it upon his appeal, leaving a receipt for it with the clerk of this court.

JOHN T. MASON, Plaintiff in Error, v. JOSEPH C. GAMBLE and another.

21 H. 390.

JURISDICTION OF SUPREME COURT—AMOUNT IN CONTROVERSY.

1. The act of May 3, 1844, which authorizes a writ of error to either party, without regard to the amount in controversy, is limited to suits brought by the United States for the infringement of the revenue laws, and does not embrace a suit against a collector for duties imposed and paid in excess of what the law justifies.
2. Such a case dismissed for want of jurisdiction, where the judgment against the collector is less than \$2,000.

WRIT of error to the circuit court for the district of Maryland.
The case is well stated in the opinion.

Mason v. Gamble.

Mr. Campbell, for the motion to dismiss.

Mr. Black, attorney general, *contra*.

Mr. Chief Justice TANEY delivered the opinion of the court.

A motion has been made to dismiss this case for want of jurisdiction, upon the ground that the sum in dispute does not exceed \$2,000.

The case is this: The plaintiff in error is the collector of the port of Baltimore, and, as such, demanded a certain amount of duties on goods imported by the defendants in error, which they believed [* 391] was greater than the amount imposed by law. *The duties demanded were paid under protest, and this suit was brought to recover back the amount alleged to be overpaid. At the trial, the jury, under the instruction of the court, found a verdict in favor of the defendants in error for the sum of \$193.88, upon which a judgment was entered against the collector; and this writ of error is brought on that judgment.

The act of congress which is supposed to give jurisdiction in cases of this description is the act of May 31st, 1844, (5 Stat. 658.) This act authorizes a writ of error, at the instance of either party, upon a final judgment in a circuit court in any civil action brought by the United States for the enforcement of the revenue laws, or for the collection of duties due or alleged to be due, without regard to the sum or value in controversy. And it is true, that the same reasons which induced the legislature to give the writ of error in the cases mentioned in the law, apply with equal force to suits against a collector to recover back duties which he alleged to be due, and had already collected. The questions are of the same character, and the interests of the United States the same in either case. And it is most probable that suits against the collector were omitted in the act of congress by some oversight or accident.

But, however that may be, the writ of error is authorized in those cases only in which the United States are plaintiffs in the suit. The language of the law is too plain to admit of doubt, and the words cannot by any reasonable or fair construction be extended to suits brought by the importer against the collector; and as the sum or value in controversy does not exceed \$2,000, and the case is not provided for by the act of congress referred to, the writ must be dismissed for want of jurisdiction in this court.

Richmond v. The City of Milwaukee.

DEAN RICHMOND, Appellant, v. THE CITY OF MILWAUKIE and another.

21 H. 391.

PRACTICE IN SUPREME COURT—AFFIDAVITS.

1. Where the value of the property in controversy is stated in the pleadings or other proceeding in the court below, it is not admissible to prove a different value to affect the jurisdiction of this court.
2. Nor will this court in any case receive affidavits of that character to reinstate a case which has been dismissed because the sum in controversy was less than \$2,000. See 2 Miller, 683.

Mr. Gillet moved to reinstate the cause on affidavits of value.

THE case is stated fully in the opinion.

* Mr. Chief Justice TANEY delivered the opinion of the [* 392] court.

This case was dismissed at a former day of the present term, because it did not appear that the value of the property in controversy exceeded \$2,000. An affidavit has now been filed on the part of the appellant, stating that the property was worth \$2,500; and a motion thereupon made to reinstate the case, to which the counsel for the appellees assent.

There are cases—such, for example, as an ejectment, or a suit for dower—in which the value does not, according to the usual forms of proceeding, appear in the pleadings or evidence in the record. In such cases, affidavits of value have been received here, in order to show that the value is large enough to give jurisdiction to this court. That was the case in *Course v. Steadman* and others, referred to in the 13th rule of this court. The case is reported in 4 Dall. 22. It was a proceeding to charge a tract of land with a lien created by a judgment; and, as the decree was against the respondent, it was necessary for her to show that the land was worth more than \$2,000, in order to support the appeal. The case of *Williamson v. Kincaid*, referred to in the above-mentioned case, (4 Dall. 19,) was an action for dower. But in both of these cases the affidavits were filed before the argument on the merits; and in *Bush v. Parker*, (5 Cr. 257,) Mr. Justice Livingston expressed his opinion strongly against giving time to file affidavits of value, and the court refused to continue the case for * that [* 393] purpose. And in the class of cases above mentioned, in which affidavits are received, there is no instance in which a case has been postponed or reinstated, in order to give the party time to produce affidavits of value. Indeed, such a practice would be

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irregular and inconvenient, and might sometimes produce conflicting affidavits, and bring on a controversy about value, occupying as much of the time of the court as the merits of the case.

And if this case were one of those in which affidavits could be received, they come too late after the case has been heard and dismissed for want of jurisdiction. But it is not a case of that description. The value of the lots about to be sold for corporation taxes was involved directly in the dispute. Their value is stated in the bill, and the amount of taxes imposed upon them, in order to show that the overcharge made by the corporation was unreasonable and oppressive; and their value is stated by the complainant to be "over \$500"—the sum mentioned being only one-fourth of the amount required to give jurisdiction to this court; and where the value is stated in the pleadings or proceedings of the court below, affidavits here have never been received to vary it or enhance it, in order to give jurisdiction. And the affidavit now offered could not have been received, even if filed before the argument of the case.

The motion to reinstate is therefore overruled.

JAMES D. PORTER and others, Plaintiffs in Error, v. BUSHROD W. FOLEY.

21 H. 393.

JURISDICTION AND PRACTICE IN SUPREME COURT—WRIT OF ERROR DEFECTIVE.

1. The doctrine of the *Insurance Co. v. Mordecai*, 2 Miller, 740, reaffirmed, to-wit, that a writ returnable on any other day than the first day of the term is fatally defective, and confers no jurisdiction.
2. It can neither be amended here nor remitted to the circuit court for amendment; but, the case being dismissed, the plaintiff may withdraw the record, that it may be used in connection with a new and valid writ.

WRIT of error to the court of appeals of Kentucky. Motion to dismiss.

The case is stated in the opinion of the court.

[* 394] *Mr. Chief Justice TANEY delivered the opinion of the court.

The writ of error in this case was issued on the 27th day of December last, and made returnable on the third Monday in January, and the defendant in error cited to appear on that day.

It has already been decided at the present term, in the case of *Insurance Co. of the Valley of Virginia v. Mordecai*, that such a

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writ of error cannot be supported, and does not bring the case before the court.

A motion has been made, on behalf of the plaintiff in error, to remand the case to the court below, with leave to amend the writ of error and citation. But, as the transcript stands, there is no case before us in which we can exercise a power of amendment. We can do nothing more than dismiss it for want of jurisdiction.

But if the plaintiff desire it, he may, in order to save expense, withdraw the transcript, and use it in connection with the proper and legal process to bring the case here; and if withdrawn, a receipt for it must be left with the clerk.

But as it now stands, it must be dismissed for want of jurisdiction.

FRANCIS MARTIN, Administrator, &c., Plaintiff in Error, v. CHRISTIAN IHMSEN.

21 H. 394.

PRACTICE IN CIRCUIT COURT OF LOUISIANA—PRESCRIPTION INTERRUPTED BY SUIT FOR SAME CAUSE OF ACTION.

1. Though by the law of Pennsylvania, where the assignment was made, the assignee of an open account cannot maintain an action, he can do so in Louisiana, where the law is otherwise.
2. In the latter State, the running of the time of prescription is interrupted by a suit concerning the matter of the subsequent suit in which prescription is pleaded.
3. An exception to the refusal of a judge, after the term of the court, to sign a bill of exception, is a nullity.

WRIT of error to the circuit court for the eastern district of Louisiana. The case is stated in the opinion.

Mr. Gillet, for plaintiff in error.

Mr. Benjamin, for defendant.

* Mr. Justice GRIER delivered the opinion of the court. [* 395]

Donovan was defendant below in an action for a balance of accounts claimed as due by him to the firm of Owen & Ihmsen. This claim had been transferred by that firm to one Frederic Lorenz, and, after his death, transferred to Ihmsen, the plaintiff below.

The cause was tried, by consent of parties, without the intervention of a jury; consequently, the exceptions to the admission of testimony are irregular, and need not be particularly noticed. Besides, we can see no good ground of objection to the evidence of

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confessions and admissions of a party, consisting of accounts rendered in a former controversy on the same subject, before arbitrators. The award itself was not received by the court as evidence of the amount of debt due, because it had been set aside from some irregularity.

The objections to the admission of the paper showing the transfers of the account were equally without foundation. By the law of Pennsylvania, where these transfers were made, Ihmsen would have an equitable interest in the account; but in that State the mere equitable assignee of an account would not sue in his own name, such *choses in action* not being assignable at common law. There the suit would have been brought in the name of Owen & Ihmsen, the original creditors, for the use of Lorenz, Ihmsen, or any other person holding the equitable right to the account. But in Louisiana, where, by the rule of the civil law, there is no such distinction between the legal and equitable title, Ihmsen, [* 396] as equitable owner, could *sustain the suit in his own name, and the assignments admitted to prove his title were properly received.

This case was tried at April term, 1856. The president judge has reported his finding of the facts and his judgment thereon. Some six months afterward, the defendants below made up a statement of facts, (to which the plaintiff refused his assent,) and presented it to the district judge, and demanded that he should seal a bill of exceptions. This the judge properly refused to do, but signed a bill of exceptions taken to his decision refusing to sign one. This novelty in practice requires no further notice.

The only question of law arising on the facts of this case as reported by the court was on the plea of prescription. On this point, the court gave their opinion as follows:

“Without considering the questions whether the account in this case is an open account, within the meaning of the statute of Louisiana, or whether the statute operates upon demands that were subsisting at its date, our conclusion is, that the proceedings in the fourth district court, relative to the award, were an interruption of that prescription. There was a suit pending between the parties, the present defendant being the plaintiff, which embraced a portion of the matter of this controversy. It was competent to the defendants, by instituting a demand in reconvention, to bring up the whole of the controversy for a settlement in that suit; and if that had been done, a legal interruption would have resulted within the 3484th, 3485th sections of the civil code. (*Dreggs v. Morgan*, 10 Rob. 120.) This was not formally done on the record, but the

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parties did, by consent, that which we are bound to consider as having an equivalent value.

"They came to an agreement that arbitrators selected by them should have the power to decide who was the creditor of the contesting parties, to settle finally ('without appeal') the amount due on either part, and that the attorney of either party might move for judgment on this award. It is clear, that had the arbitrators proceeded regularly, and a judgment been rendered upon it, no exception could have been taken to the condition of the pleadings in the pending suit, or that there * had not been [* 397] a demand in reconvention. The consent in the submission agreement implied a waiver of all pleadings of that nature, and was a release of all errors in the preliminary stages of the suit. Donovan appeared in the district court, and successfully resisted a motion for judgment upon the award rendered. But the code does not require that a suit should be successfully prosecuted to operate as an interruption of prescription. (Trop. de Pres. sec. 561 ; Dunn v. Kinney, 11 Rob. 247; Baden v. Baden, 4 Ann., 468.)"

We see no error in this statement of the law, and consequently affirm the judgment with costs.

LESLIE COMBS, Appellant, v. JOHN L. HODGE, Administrator, and others.

21 H. 397.

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NEGOTIABLE INSTRUMENTS—CASE BADLY PRESENTED REVERSED AND REMANDED.

1. Pleadings in a suit between other parties, not signed by any party to the present suit, are inadmissible as evidence.
2. Certificates of the public debt of the republic of Texas distinguished from negotiable instruments, and the distinction considered in the authorities.
3. Case wanting in evidence of material matters within the knowledge of the parties to the suit reversed and remanded for amended pleadings and further testimony.

APPEAL from the circuit court for the District of Columbia.

The case is sufficiently stated in the opinion.

Mr. Bradley and *Mr. Baxter*, for appellant.

Mr. Reverdy Johnson, senior, and *Mr. R. Johnson, junior*, for appellees.

* Mr. Justice CAMPBELL delivered the opinion of the court. [* 403]

The plaintiff filed his bill to establish his claim to two certificates for a portion of the public debt of the republic of Texas, which had been issued to him in the year 1839, and which were

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transferable by him, or his attorney, or his representative, only, on the books of the stock commissioner of that state. He avers that these certificates with others were endorsed in blank by him, and sent to the defendant, Love, in Texas, during the year [* 404] 1840, with authority to receive an * anticipated partial payment, and to obtain other certificates of the same description for the residue. That he did not give to his agent any authority to sell them, or to dispose of them for his own use, and has done no act to defeat his own legal title to them. That Love did not collect any part of the debt, and has failed to return the two certificates in question. That for fifteen years he has been unable to discover who was in possession of them, and has but recently ascertained that they were held by one of the defendants under a claim of title from Love.

He attached to his bill a number of letters of Love, containing admissions of his receipt of the certificates, and of his agency for the plaintiff; and subsequently to the conversion by him of these, he wrote to the plaintiff in extenuation of his conduct, affirming that he had a power of attorney and letters from the plaintiff authorizing him to sell. That he would endeavor to replace the stock, or would give other stock of the same description, and insisted that the liberty he had taken was excusable.

The defendant (Hodge) answered to the bill that these certificates were claimed as the property of the decedent, Andrew Hodge. That he purchased them from Love fairly, and for their full value, and with a firm conviction that he was authorized by a power of attorney, and the blank endorsement of the plaintiff, to dispose of them. The cause was heard upon the pleadings and a decree *pro confesso* against Love.

The record in the district court at New Orleans in the suit between Love and Hodge, appended to the bill, does not contain evidence applicable to this cause. The parties to that suit were different, and the petition and answer are signed by counsel, and not by the parties, and cannot be resorted to for admissions of the respective parties. (Boileau v. Rutlin, 2 Ex. 665.) There is no evidence of the existence of a power of attorney from the plaintiff to Love, except that contained in the letter of Love before referred to. If that statement is at all admissible, it is insufficient to establish the fact. The letter was written in 1844, after Love had violated his obligation as a faithful agent, and in reply to [* 405] reproaches of the plaintiff. In * that letter he promises to restore to the plaintiff these or other certificates. There is no evidence of any fulfillment of this promise. He has failed to

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produce a power of attorney, or any letters which authorize his sale to his co-defendant. The witnesses of the contract between him and the decedent (Andrew Hodge) have not been examined. These circumstances raise a strong presumption against the verity of his statement, and deprive his letter of any probative force. The title of the defendant therefore depends upon the effect to be given to the endorsement of the certificates in blank by the plaintiff, and their deposit with Love. The question is, was he invested with such a title that a *bona fide* purchaser, having no notice of its infirmity, will be protected against a latent defect? The law merchant accords such protection to a holder of a bill of exchange taken in the course of business for value, and without notice; and legislation in Great Britain and some of the States of the Union has extended to the same class of persons a similar protection in other contracts.

But this concession is made for the security and convenience, if not to the necessities and wants, of commerce, and is not to be extended beyond them. It is a departure from the fundamental principle of property, which secures the title of the original owner against a wrongful disposition by another person, and which does not permit one to transfer a better title than he has. The party who claims the benefit of the exception to this principle must come within all the conditions on which it depends. In the case of bills of exchange that have originated in fraud or illegality, the holder is bound to establish that he is not an accessory to the illegal or fraudulent design, but a holder for value. If the bill is taken out of the course of trade as overdue, or with notice, the rights of the holder are subjected to the operation of the general rule. In *Ashurst v. The Official Manager of the Bank of Australia*, 37 L. and Eq. R. 195, Justice Earl says: "It seems to me extremely important to draw the line clearly between negotiable instruments, properly so called, and ordinary chattels, which are transferable by delivery, though the transferrer can only pass such title as he had. As to negotiable instruments, during their currency, delivery *to a *bona fide* holder for value gives a title, [* 406] even though the transferrer should have acquired the instrument by theft; but after maturity the instrument becomes in effect a chattel only in the sense I have mentioned." When the instrument is one which by law is not negotiable, or when the negotiability has been restricted by the parties, the rule of the law merchant has no application. The loss of the instrument with the name of the payee upon it, or its transfer by a faithless agent, does not impair the title of the owner. Nor can a purchaser

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safely draw any conclusion from the existence of an endorsement on such a paper that the holder is entitled to sell or to discount it. (*Birdeback v. Wilkins*, 10 Harris, 26; *Ames v. Drew*, 11 Foster, 475; *Symonds v. Atkinson*, 37 L. and Eq. 585; 25 L. and Eq. 318.) Nor can the holder write an assignment or guarantee not authorized by the endorser. (4 Duer, 45; 25 L. and Eq. 19; 6 Harris, 434.) This doctrine has been applied to determine conflicting claims to public securities which were not negotiable on their face, though the subject of frequent transfers.

The suit of *Toukin v. Fuller* (3 Doug. 300) was for four victualing bills drawn by commissioners of the victualing office on their treasurer, in favor of their creditor. These were sent to an agent with a power of attorney, "to receive money and give receipts and discharges," and who pledged them for an advance of money. Lord Mansfield said the only question is, who has the right of property in this bill? It must be the plaintiff's, unless he has done something to entitle another. It is deposited with the defendant by one who had it under a limited power of attorney. If the plaintiff had ever consented to the disposal of the bill, he would not be allowed to object, nor would he if the money had ever come to his use. But here there is no such pretense.

Glynn v. Baker (13 East. 509) was a suit for bonds of the East India Company, payable to their treasurer, and sold with his endorsement. Le Blanc, justice, said:

"Here are persons intrusted with the securities of A and B, who part with the securities of A, and, when called on for them, [*407] give the securities of B. That difficulty can only be met by assimilating such securities to cash, which, whether it has an ear-mark set upon it or not, if passed by the person intrusted with it to a *bona fide* holder for valuable consideration, without notice, cannot be recovered by the rightful owner; but how does the similitude hold?"

And Lord Ellenborough said, "any individual might as well make his bond negotiable."

The case of *Dunn v. Commercial Bank of Buffalo* (11 Barb. 580) originated in the refusal of that bank to allow a transfer of stock on the books of the bank, which was transferable by the holder of the certificate or his representative.

The plaintiff had the certificate and a blank assignment, and a blank power of attorney, and claimed to make the transfer. The court denied that certificates of stock in reference to negotiability are placed on the same ground as bills of exchange, and declare that it is incumbent on a party claiming under such a transfer to

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prove the contract or consideration. In *Menard v. Shaw*, comptroller, (5 Texas R. 334,) the supreme court of that State decide that the agency of the payee named in certificates like the present is indispensable to a legal transfer on the books of the State, and that a forced sale was therefore inoperative. The decision of *Baldwin v. Ely* (9 How. 273) does not sanction the claim of the defendants.

The certificates which were the subject of controversy were issued, under an act of congress, to a person or his assigns.

The ordinary form of assignment was a blank endorsement, and this had been recognized as sufficient at the treasury of the United States, and in the ordinary traffic in the community.

The defendant proved that he had paid value for them. In the cases cited from *Douglas* and *East*, the judges stated that the existence of similar facts might give another aspect to the claims of the defendants in these cases. In the case before us, the certificates were transferable, in terms only, in a single mode.

There was no evidence that a transfer in any other form than that prescribed had ever been recognized.

We have considered this cause upon the assumption that the defendant was a holder for value.

* There is no statement in the answer of the consideration paid to Love for these certificates, nor of the time, place, and circumstances, of the contract between him and the defendant's testator. It appears that the plaintiff did not direct their sale or transfer, and that they were not disposed of on his account; and if there had been a power of attorney containing an authority to sell, the circumstances would have imposed upon the defendant the necessity of showing there was no collusion with Love. Upon the case as presented the court is constrained to reverse the decree of the circuit court, dismissing the plaintiff's bill. But the case is presented in an unsatisfactory manner.

The transaction between Love and the decedent (Hodge) has not been exhibited to the court, although parties fully cognizant of it are before the court.

We have concluded to remand the cause to the circuit court, with directions to allow the parties to amend the pleadings, and to take testimony, if they should be so advised.

The United States v. Nye.

THE UNITED STATES, Appellants, v. MICHAEL C. NYE.

21 H. 408.

THE UNITED STATES, Appellants, v. NATHANIEL BASSETT.

21 H. 412.

CALIFORNIA LAND GRANTS.

1. Micheltorena's general power to Sutter to grant or confirm titles within his jurisdiction of New Helvetia and Sacramento was abrogated by the unsuccessful issue and overthrow of the former in the contest in which he was then engaged.
2. In the present case the power conferred was exercised more than a year after Micheltorena's abdication, and the claim founded on it is void, and the claimant's petition must be dismissed.

APPEAL from the district court for northern California. The facts are fully stated in the opinion.

Mr. Black, attorney general, and *Mr. Hull*, for the United States.

Mr. Blair and *Mr. V. E. Howard*, for appellee.

[* 409] * Mr. Justice CAMPBELL delivered the opinion of the court.

The appellee claimed, before the board of commissioners for the settlement of land claims in California, four leagues of land called "Wylly," situate on the Sacramento river and the Arroyo de los Venados. His evidence consists of a petition addressed to Micheltorena, Mexican governor of the department of Californias, in December, 1843, at Monterey, representing that he was a native of the United States; that he had resided in Mexico two years; that he had some horses and cattle, and desired to possess a suitable place for them. The governor referred this petition to the secretary, Jimeno, to obtain the proper information on the subject.

The secretary referred the petition to Senor Sutter, commissioner (*encargado*) of the * frontier of the Sacramento.

[* 410] Sutter certifies, on this reference, that the land is now unoccupied. His certificate is dated 29th January, 1844. There is no evidence to show that these papers were returned to Micheltorena, or that he ever saw the certificate. They are produced by the claimant.

The remainder of his evidence consists of what is termed, in the opinion of the board, "Sutter's general title," which bears date the 22d December, 1844, and is as follows:

"Manuel Micheltorena, brigadier general of the Mexican army, adjutant general of the *Plana Mayor*, governor, commandant general, and inspector of the department of the Californias.

"The supreme departmental government being unable, in conse-

quence of its incessant occupations, to draw up, one by one, the respective title papers (*titulos*) for those citizens who have solicited lands, with *informe* in their favor of Mr. Augustus Sutter, captain and judge charged with the jurisdiction of New Helvetia and Sacramento :

“ In the name of the Mexican nation, I do by these letters confer upon them and their families the property of the lands designated in their respective applications (*instancias*) and maps, (*dissenos*,) upon all and each one who have solicited (the same) and obtained the favorable *informe* of the aforesaid Mr. Sutter, up to the day of this date—so that nobody shall have power to question their right of property, a copy hereof, which Mr. Sutter shall hereafter give them, serving them for a formal title, with which they will present themselves to this government, in order to extend the same title in due form and on stamped paper.

“ And that it may remain firm and stable in all time, I give this document, which shall be recognized and respected by all the authorities, civil and military, of the Mexican nation, in this and the other departments, authenticated with the military and governmental seals in Monterey, this twenty-second day of December, one thousand and eight hundred and forty-four.

“MICHELTORENA.”

“I certify this is a copy.

“*New Helvetia, June 8th, 1846.*

“J. A. SUTTER.”

*The circumstances under which this order was executed [* 411] appear from a deposition of Sutter to be found in the record. He says: “That this document was delivered to him at his request. That the governor was blockaded at Monterey, and would not deliver titles to the American and other immigrants who were desirous of obtaining lands, and he (Sutter) advised him to give them titles at once; and that the governor had not time to do it in any other way. He never knew that the governor was blockaded until the courier came with the paper above referred to.” He further testifies that the mode he had adopted in giving titles to individual settlers was, to deliver certified copies of this decree of Micheltorena to those who had rendered meritorious services to the country, and who applied to him. That Governor Micheltorena, at his request, made a speech to the soldiers, and promised lands to all those whom he (Sutter) should recommend as worthy to receive them. The general title was issued before the men marched from New Helvetia. He testifies that the lands were never measured,

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and there was no formal delivery of possession. There were no surveyors or means of measurement. We have examined with particularity the Mexican laws of colonization in the case of the United States v. John A. Sutter, at this term, and it is not necessary to do so in this case. It is evident that this "general title" had no reference to those laws, as none of their requirements were considered when it was made. It is questionable whether the previous application of the claimant was before the governor, or under the control of his subordinates, at its date. The general title was sent to Sutter, to enable him to raise a military force to assist the governor, who was confined to his capital by the forces of the insurgent chiefs, who had determined to expel him from the country. His ability to comply with the expectations it encouraged depended upon the success of his efforts to maintain his authority in the department, and to secure the sanction of the supreme government to the extraordinary measures he had adopted for that purpose. The decree has no signification except as an appeal to Sutter, and the persons under his influence, to come to his relief, and [* 412] as a promise to them that he * would make a liberal distribution of land among them, in case they should faithfully and successfully assist him in his extremity. But the issue of the war was fatal to Micheltorena, who was compelled to leave the country; and Sutter, his lieutenant and partisan, was made prisoner, and was required to abandon his chief, and to promise fidelity to his enemies. Whatever power was conferred upon Sutter was abrogated then, if not before. The execution of the power conferred, if any, in favor of this claimant, did not take place for more than a year after the abdication of Micheltorena.

The opinion of the court is, that the claim of the appellee is invalid, and the decree of the district court is reversed, and the cause remanded, with directions to that court to dismiss the petition.

THE UNITED STATES, Appellants, v. NATHANIEL BASSETT.

Mr. Justice CAMPBELL delivered the opinion of the court.

The appellee submitted to the board of commissioners appointed under the act of congress of the 3d of March, 1851, (9 [* 413] * Stat. at L. 632, ch. 41,) to settle private land claims in California, a claim for four square leagues of land in the valley of the Sacramento river, called "Las Colussas," as the assignee of John Danbenbiss. His evidence consists of a petition of Danbenbiss to Micheltorena, governor of California, dated in July, 1844, in which he describes himself as a native of Germany, but

naturalized in Mexico, where he had resided two years, and that he desired a grant of this land to devote himself to agriculture. The secretary, Jimeno, reported that the consideration of many petitions of the same nature had been postponed until after the governor had visited the country of the Sacramento and San Joaquin; and as he had no general map of the country to guide them in making grants, he suggested that this petition should be laid over with the others. The governor thereupon made an order that the petitioner might take possession, and deferred further action until he should visit the country; and returned the papers to the petitioner.

During the fall of 1844, a formidable insurrection against Micheltorena was maintained by some of the leading men in California, and in the month of December of that year he was beleaguered at Monterey. One of the principal grounds of complaint against him was an imputed disposition to strengthen the settlement of Sutter on the Sacramento by improvident grants to foreign emigrants.

While the governor was blockaded at Monterey, a courier was sent to Sutter, conveying the document known as Sutter's "general title," which is set out in the opinion of the court in the case of the *United States v. Michael C. Nye*, and by which Sutter was enabled to collect a body of "foreign volunteers," who went to the aid of the governor. Danbenbiss was one of those who accompanied Sutter.

The forces of the rival chiefs met at Coahuanga the latter part of February, 1845, and, after a bloodless battle, Micheltorena consented to abdicate his office in a short time, and to leave the country. In June, 1846, Sutter gave to the petitioner (Danbenbiss) a certified copy of the "general grant," which was produced to the board of commissioners as the complement to the other evidence of title in favor of Danbenbiss.

* None of these documents are to be found in the public [* 414] archives. No trace of the evidence on which these titles depend is exhibited in any of the records of that State. The consideration on which they were made have no reference to the colonization laws of Mexico. The promises of Micheltorena to Sutter, and through Sutter to the foreign volunteers, did not confer a title to any part of the public domain, nor perfect any incipient pretension into a vested interest. The parties looked to the contingency of a suppression of the revolt and the maintenance of the power of the governor for the fulfillment of these promises. In this they were disappointed. The paper remained in the possession of Sutter for nearly fifteen months after the defeat and abdication of Micheltorena, before he gave a copy to Danbenbiss.

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For these reasons, and others contained in the opinion of the court in the case of the United States v. Nye, it is the judgment of the court that the claim presented by the appellee is invalid. The decree of the district court of the United States for the northern district of California is reversed, and the cause remanded to that court, with directions to that court to dismiss the petition.

THE WHITE WATER VALLEY COMPANY, Appellants, v. HENRY VALLETTE and others.

21 H. 414.

CORPORATION—POWER TO BORROW MONEY—USURY.

1. A corporation may, without special authority, in the course of legitimate business, make a bond, note, draft, mortgage, or an assignment.
2. In the present case the charter of the appellant company gave such authority by its terms.
3. The bonds in which this suit is founded are not usurious on their face, nor does the extrinsic evidence support the allegation that there was usury in the contract under which they were issued. That the work for which they were done was at large profits, known to both parties, does not establish a design to allow usurious interest and evade the statute.
4. An agreement by the corporators that the bonds should be a lien on the property of the company prior to all others will be enforced in equity as against the company.
5. A contract by such a corporation, if originally usurious, may be validated by an act of the legislature, since usury is founded on a public policy which the legislative power may reverse as far as it chooses.

APPEAL from the circuit court for the district of Indiana. The matter is sufficiently stated in the opinion.

Mr. McLean and *Mr. Stanbery*, for appellants.

Mr. Ewing and *Mr. Swayne*, for appellees.

[* 419] * Mr. Justice CAMPBELL delivered the opinion of the court. This controversy originated in a contract between the appellants and the appellee, (Vallette,) in which the latter agreed to complete that portion of the canal through the valley of White Water river that lies between the cities of Laurel and Cambridge, in Indiana.

In the year 1836, the State of Indiana projected the
[* 420] improvement * of which this is a part, and prosecuted the work until 1842, at an expenditure of more than one million of dollars. In that year the appellants were incorporated, and the State surrendered the unfinished work to them, investing them

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with powers to continue it till its completion. In 1844 this corporation became embarrassed in their affairs, and were unable to negotiate loans upon the pledge of their property. Their resources were inadequate to the demands of their enterprise, and there was fear that it would be abandoned, or at least inconveniently postponed. In July, 1844, the president of the company applied to the appellee (Vallette) for assistance, and the result of their negotiation was, that the latter submitted a proposal to the company to supply materials, and to complete at his expense the canal, according to the plan of the chief engineer, by the first of September, 1845, for one hundred and twenty-five bonds of the company, at \$1,000 each, upon ten years' time, drawing interest at seven per cent. per annum, payable semi-annually, he (Vallette) to pay in the paper of the company \$500 as a bonus.

This proposal was accepted, and a detail contract was drawn out and executed, embracing some modifications not material to this dispute. The appellee agreed to construct in a substantial and workmanlike manner the sections of the canal, under the directions of the chief engineer, and according to particular specifications. The engineer was to decide whether the work had been performed agreeably to contract and the instructions of the engineer; and payment was to be made upon his certificate of the work done at the end of every sixty days. The contract was punctually performed by the appellee to the satisfaction of the company, and upon a final settlement one hundred and sixteen bonds of \$1,000 each were issued to him, one hundred and twelve bearing date the 1st of February, 1845, with interest at the rate of seven per cent. per annum, payable semi-annually at New York, the principal to be paid at ten years from date. These bonds contain recitals and stipulations as follows: That the principal sum is the first and only loan created by the company under their charter for the completion of the canal; that the faith of the company and *their [*421] effects, real and personal, are pledged for the payment of the debt and interest; that these bonds shall have a preference over all debts to be thereafter contracted; that in default of the payment of interest, the holder of the bonds might enter into possession of the tolls, water rents, and other incomes of the company; and might apply to any court of the State (federal or State) for the appointment of a receiver, and that the company would not appeal to any other court; that they would pay ten per cent. as liquidated damages on the amount of the interest thus collected. The interest on these bonds was paid until August, 1854, since when the corporation has been in default.

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The appellees hold the one hundred and twelve bonds above described, and have filed this bill to enforce the covenants they contain by the appointment of a receiver. They allege that the company is insolvent; that its stock has no value, and that the canal is exposed to dilapidation and ruin, and they have no ability to remedy such disasters.

The defendants resist the demand of the appellees. They aver that the president of the company applied to Vallette for a loan of money; that Vallette was willing to advance the sum required, if he could make a profit of one hundred per cent., and the president and directors were ready to concede this profit. That the contract was made between them as a device and contrivance to evade the laws of Indiana upon the subject of interest and usury, and that the contract between the parties in its essence and spirit was a loan of money at that exorbitant and usurious rate of interest. That the work was done by the company through the superintendence of their engineer, and that Vallette paid out the money to contractors merely to secure its appropriation to the improvement of the canal to strengthen his security. That the amount expended was but \$56,000, and the estimates of the engineer prior to the making of the contract did not exceed \$65,000; and that the contract was arranged so that the profit of one hundred per cent. might be realized.

They complain that the exactions of the appellee were exorbitant and oppressive. That the canal has been exposed to [* 422] * disasters from heavy floods, and a debt has been created for reparations and improvements that is superior in dignity and merit to that of the appellee, and that he had waived his preference to induce them to make the advance.

In the absence of objections to the validity of these bonds, there can be no question concerning their legal operation and effect, or of the jurisdiction of a court of equity to enforce them. That court treats an agreement for a mortgage or pledge of bonds, or other property, as binding, and will give it effect according to the intention of the contracting parties. (*Duncan v. The Company of Proprietors of the Manchester Water Works*, 8 Pri. 697; *Fector v. Philpott*, 12 Pri. 197; *Seymour v. Canandaigua and N. F. R. R. Co.* 25 Barb. 284.)

In *Fripp v. Chard Railway Company*, (21 Law and Eq. 53,) the vice chancellor decided that the court of chancery might appoint a receiver of the property of a corporation created by act of parliament in favor of a mortgagee, although by the act a committee was constituted to whom all the powers of management were re-

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ferred. And at the present term of this court a receiver for the tolls of a bridge erected by a corporation in Indiana was allowed by this court in favor of a judgment creditor, whose legal remedy had been exhausted. (*Covington Drawbridge Company v. Shepherd*, 21 How.)

The question then arises, whether the contract between these parties, as disclosed by the pleadings and proofs, is valid. It is essential to the nature of usury in Indiana, that a certain gain exceeding the legal rate of interest should accrue to the lender as a consideration for the loan. Where there is no loan there can be no usury. (*State Bank v. Coquillard*, 6 Ind. 232.)

And where there is a loan, although the profit derived to the lender exceeds the legal rate, yet if that profit is contingent or uncertain, the contract, if *bona fide* and without any design to evade the statute, is not usurious. (*Cross v. Hepner*, 7 Ind. 357.)

The testimony does not support the averment of the answer, that this contract involved a device or contrivance to elude the prohibition of the statute. The president of the corporation (Mr. Helm) testifies: "I know nothing of any such device or arrangement; I thought it was all right; and there was none, [* 423] so far as I know or believe, to evade the usury laws of Indiana; nor was there any device or arrangement to cover up a loan of money from Vallette to said company, as I know of no such loan." The testimony of the solicitor of the corporation, (Mr. Parker,) who superintended all the negotiations, and drew the papers, is equally explicit. He says: "I am satisfied there was no device or management had or intended between said Vallette and the canal company, in the matter of this contract or otherwise, whatever, in this connection, to void any usury laws of the State of Indiana, or any other State. I never thought of such a thing myself, and never had an intimation of it from any other source; and had there been anything of the kind, I would certainly have known it, as I have said the whole matter in every shape it assumed was presented to me for my consideration. Vallette had all the risk of his contract on his own hands, until completed and taken off his hands by the company. And I have a strong impression in my own mind, that in one if not more instances he suffered by that risk in consequence of damage done his work, while in progress, by high waters." In the absence of simulation in the contract, the reason assigned in the last sentences quoted from the testimony of this witness is conclusive on the question of the usury. These witnesses are sustained by their fellow members of the board. The recital in the bonds, that this was a loan, is explained by the fact

that the form of the bonds was settled after the work was finished, and with reference to their negotiability in New York, and the contract was regarded with favor by the corporation, and the payment of interest was made without exception for several years. It is admitted that the contract provided prices for the work done far exceeding the cash estimates of the engineer. This, the witnesses say, was the natural consequence of the embarrassment of the company and their want of credit. But they prove that the proposal of Vallette was understood and considerably examined; that it was adopted by the board, with only one dissentient vote; that its conditions were performed in good faith by the appellee, and that the final settlement between the contracting parties [* 424] was * amicable. There was on the part of the appellee no fraud or circumvention.

These facts oppose an insuperable bar to any relief from the contract on the ground of lesion or oppression. (*Harrison v. Guest*, 35 Law and Eq. 487.)

The remaining question for consideration is, whether it was competent for this corporation to execute such securities as these bonds in fulfillment of their covenants in a construction contract, fairly made and executed by the other party. The first section of the act of incorporation endows the corporate body with faculties for suits, contracts, and all other things legitimate for such company to do; and "all the powers and privileges in anywise necessary and expedient to carry into effect the proper business" of the association. The seventeenth section establishes the president and directors as the governing body, and that "their regular and efficient doings not inconsistent with this charter" "shall in all cases be deemed the doings of the company, and forever held valid as such."

The 18th section invests them with "full power to negotiate any loans that may be deemed expedient for carrying out all the objects contemplated by this act; and for the payment of such loans, agreeably to the terms agreed upon, said company shall bind themselves by their bonds, which bonds," &c., &c., &c., "shall be a valid lien upon all the stock and effects of said company in the order of their issue, and all the effects of the company, both real and personal, shall be deemed and taken as a pledge for the punctual payment of the interest on said bonds, and the ultimate redemption of the principal, agreeably to contract.

It is well settled that a corporation, without special authority, may dispose of land, goods, and chattels, or of any interest in the same, as it deems expedient, and in the course of their legitimate business may make a bond, mortgage, note, or draft; and also may

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make compositions with creditors, or an assignment for their benefit, with preferences, except when restrained by law. (*Partidge v. Badger*, 25 Barb. 146; *Barry v. Merchants' Ex. Co.* 1 Sand. Ch. R. 280; *Burr v. Phoenix Glass Co.* 14 Barb. 358; *Dater v. Bank of the U. S.* 5 W. and *S. 223; *Frazier v.* [* 425] *Wilcox*, 4 Rob. 517; *U. S. Bank v. Huth*, 4 B. M. 423; *The State v. Bank of Md.* 6 G. and J. 323; *Pierce v. Emery*, 32 N. H. 486.)

But, in addition to the general powers of the corporation, in this instance there is "*full power*" (specially conferred) to negotiate any loan or loans that the company might deem expedient for carrying out any or all of the objects of the act. We should find great difficulty in deciding that the corporation was restrained by the laws concerning interest and usury, in view of the comprehensive language of the 18th section of the act. Those laws rest upon considerations of policy applicable, for the most part, to individuals engaged in their ordinary business; and the legislature might well conclude that a numerous body, engaged in a public enterprise, under the direction of an intelligent board, might be trusted with a plenary control of their property or credit, to accomplish the aim of the association.

If the rights of the appellees depended upon the act of incorporation alone, it would be difficult to resist them. But, in January, 1845, the legislature of Indiana passed an act, that recites the corporation had entered into a contract with Vallette to complete the canal, and was to be paid in their bonds, drawing the legal interest in New York, and doubts were entertained as to the legality of the issue of these bonds; and thereupon it was enacted, that all the bonds which might be issued in accordance with the contract existing between the company and Vallette, were *legalized*. A large portion of the work specified in the contract was performed after this enactment, and the settlement under which these bonds were issued took place subsequently. This act implies that there was no illegality in the fact that bonds were employed as a medium of payment for supplies of materials for, or work and labor done upon, the canal.

The objection that a contract is illegal, and that no judgment can therefore be rendered upon it, is not allowed from any consideration of favor to those who allege it. The courts, from public considerations, refuse their aid to enforce obligations which contravene the laws or policy of the State. When the *legislature relieves a contract from the imputation of [* 426] illegality, neither of the parties to the contract are in a

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condition to insist on this objection. (*Andrews v. Russell*, 7 Black. 475; 8 Ind. 27.)

Upon a review of the whole case, it is the opinion of the court that the contract between these parties was made without fraud or surprise; that there is no illegality in the cause, or consideration; that the priority of payment has not been released or defeated; and that the relief sought is within the competency of a court of equity to allow.

Decree affirmed.

ALTON R. EASTON, Plaintiff in Error, v. THOMAS L. SALISBURY.

21 H. 426.

MISSOURI LAND LAW—SPANISH GRANTS.

1. The United States, by various acts of congress, reserved from sale or other disposition lands to which claims had been set up under Spanish and French grants in the Louisiana purchase; but from the years 1829 to 1832 these reservation acts were annulled or inoperative. In 1836 the concession under which defendant held or claimed was confirmed by an act of congress. Held, that a location by plaintiff of a New Madrid certificate on this land in 1818, and a patent issued thereon in 1827, were void, because at both these dates it was reserved by act of congress, and the action of the land officers was without authority.
2. That the failure to renew or keep alive this reservation from 1829 to 1832 did not make valid the title of Easton which was void before.

WRIT of error to the supreme court of Missouri. The case is stated in the opinion.

Mr. Gibson and *Mr. Gamble*, for plaintiff in error.

Mr. Ewing, for defendant.

[* 428] * Mr Justice McLEAN delivered the opinion of the court.

This was a writ of error to the supreme court of the State of Missouri.

The parties agreed as to the facts in this case, in order that the points of law might be ruled by the court.

On the 9th of July, 1811, there were confirmed to James Smith, by the commissioners for the adjustment of titles to land in the territory of Missouri, lots nine and ten, (9 and 10,) containing two arpens of land, in the village of Little Prairie, in the county of
 [* 429] New Madrid, State of Missouri. Afterwards * these lots, while still owned by said Smith, were materially injured by earthquakes, and proof thereof was made before the recorder of land titles at St. Louis, on the 16th of November, 1815; whereupon,

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there was issued by said recorder, to said James Smith, a certificate of new location, (commonly called a New Madrid certificate,) numbered 159. On the 22d of October, 1816, said Smith and wife conveyed to Rufus Easton the said two arpens in Little Prairie, and assigned to him the right to locate other lands under said certificate in lieu of the land so injured, and also conveyed to said Easton the land that might be located by means of said certificate. On the 16th of November, 1816, Easton gave notice to the surveyor general of said territory of Missouri of the location of said certificate on a tract of land about two miles west of the city of St. Louis, and demanded a survey thereof. In March, 1818, a survey was made, by direction of the surveyor general, in pursuance of said selection, and was duly returned and approved by said surveyor general; said survey is numbered 2,491, and the land thereby designated embraces the land in controversy, and is within St. Louis township, in St. Louis county, Missouri. By virtue of the premises, Easton held said land, claiming the same until 1826, when he conveyed the same to William Russell. On the 28th day of May, 1827, the United States issued a patent on said location for said land to James Smith or his legal representatives. On the 19th of January, 1839, William assigned and conveyed all his interest in said land to J. G. Easton, who, on the 18th of March, 1845, conveyed and assigned the same to plaintiff. Defendant is in possession of the land described in the petition, and the same is within the boundaries indicated by said survey and patent.

On the 20th of January, 1800, a concession was made by the Spanish lieutenant governor, to one Mordecai Bell, of three hundred and fifty arpens of land, including the premises in controversy. The representatives of Mordecai Bell, on the 29th of June, 1808, presented the claim for said land, together with a descriptive plat of survey thereof, to the board of commissioners for the adjustment of land titles in the territory of Missouri. The documents showing said claim, and the * derivative title from Mor- [* 430] decai Bell, were duly recorded in 1808 by the recorder of land titles for the territory of Missouri. And on the 4th day of July, 1836, the United States confirmed said claim, according to said plat of survey, to the legal representatives of M. Bell; a survey of said confirmation was made by authority of the United States in —, and is numbered 3,026. Said survey embraces the land in dispute; and all the title of the confirmer, by the act of 1836, is in the defendant. The survey numbered 2,491, and also the patent dated 28th of May, 1827, are in due form of law; but defendant does not admit the authority of the officers of the United States

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to make the one or issue the other, nor that the same were made or issued under any law. It is admitted that the land in controversy is worth more than two thousand dollars; that if the court should be of opinion that the plaintiff is entitled to recover, it is agreed that the damages shall be fixed at one cent, and the monthly value of the premises at one dollar. Either party is at liberty to turn this case into a bill of exceptions, and thereon prosecute a writ of error, or take an appeal to the supreme court of the State of Missouri, or of the United States. It is admitted that survey No. 3,026 was made under the authority of the United States, but the plaintiff may dispute the power of the United States as regards both the confirmation of 1836 and the survey No. 3,026.

It is admitted that the plaintiff had, at the commencement of this suit, all the title that was invested in said James Smith, or his representatives, by the New Madrid location and patent above mentioned.

It will be observed that this controversy arises between a New Madrid title and a Spanish concession. A holder of a New Madrid certificate had a right to locate it on any of the public lands which had been authorized to be sold. This claim came into the hands of Alton R. Easton, the plaintiff in error. It was surveyed in March, 1818, and the 28th of May, 1827, the United States issued a patent to James Smith, or his legal representatives.

From 1808 to the 26th of May, 1829, reservations were made from time to time to satisfy certain claims, but from that [* 431] time * they ceased, until renewed by the act of the 9th of July, 1832. During this period, it is understood by the plaintiff in error, the "land in question was subject to be disposed of to any person, or in any manner, and was then open to entry or location. And it is urged that the plaintiff had the right during this time to perfect his title."

The President of the United States has no right to issue patents for land, the sale of which is not authorized by law. In the case of *Stoddard v. Chambers*, (2 How. 318,) it is said, "The location of Chambers was made on lands not liable to be thus appropriated, but expressly reserved; and this was the case when his patent was issued." Had the entry been made or the patent issued after the 26th of May, 1829, when the reservation ceased, and before it was revived by the act of 1832, the title of the defendant could not be contested.

Nothing was done to give Easton's title validity, from the cessation of the reservation, in 1829, until its revival, in 1832. His entry was made in 1818, and on the 28th of May, 1827, his patent

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was issued. The land located and patented, having been reserved, was not liable to be appropriated by his patent. Whether the withdrawal of the patent might have been procured, or a new one instituted, it is not necessary to inquire. No such attempt was made.

But it seems by the act of the 26th of April, 1822, it was provided that all warrants under the New Madrid act of the 15th of February, 1815, which shall not be located within one year, shall be held null and void. This law is decisive upon this point: all New Madrid warrants not located within one year from the 26th of April, 1822, are null and void. Smith's or Easton's certificate for the New Madrid claim was void, and also his patent when issued, under the paramount claim of Bell, whose title was confirmed by the act of the 4th of July, 1836. Bell made the conveyance to Mackey, not having the legal title; but when, under the act of 1836, the report of the commissioners was confirmed to Bell and his legal representatives, the legal title vested in him, and inured, by way of estoppel, to the grantee, and those who claim by deed under him. (*Stoddard v. Chambers*, 2 How. 317.)

* There was no period from the entry and patent of the [* 432] New Madrid claim in which that claim was valid. The location was not only voidable, but it was absolutely void, as it was made on land subject to a prior right. And under the act of 1822, all New Madrid warrants not located within a year from that date, were declared to be void.

Whether we look at the confirmatory act of 1836, which vested the title in the confirmer, or to the New Madrid title asserted against it, it is clear that the New Madrid title is without validity, and that the fee is vested in the grantee of Bell.

JULIAN McCARTY and JOHN WYNN, Administrators, Plaintiffs in Error, v. GUERNSEY Y. ROOTS, ERASTUS P. COE, and JOHN H. AYDELOTTE.

21 H. 432.

NEGOTIABLE PAPER—LIABILITIES OF ENDORSERS TO EACH OTHER.

1. Successive endorsers of negotiable paper, as they appear on the paper, are not jointly liable, or liable for contribution, unless an express agreement to that effect exists.
2. An endorser may take up the paper, after its maturity and dishonor, and place it as collateral security for his own debt to a third party, who can recover against the prior endorsers.
3. The fact that the party who, as endorser, took up the bill, was a trustee in an assignment for the benefit of creditors of the payer, is no defense, unless it is shown that, as such assignee, he had funds sufficient to pay the debt, which ought to be applied to that purpose.

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WRIT of error to the circuit court for the district of Indiana. The case was decided on pleading and demurrers, and is sufficiently stated in the opinion.

Mr. Oliver H. Smith, for plaintiffs in error.

Mr. Gillet, for defendants.

[* 437] * Mr. Justice McLEAN delivered the opinion of the court.

This is a writ of error to the district court of Indiana.

The action was brought on a bill of exchange for \$4,500, dated October 16, 1854, drawn by Tyner & Childers, of Peru, Indiana, on Richard Tyner, of New York, and made payable to the defendant sixty days after date, at the office of Winslow, Lanier & Co., in the city of New York; which bill, at sight, was accepted by the drawee, and afterwards by the payee assigned to one Holland, who subsequently assigned it to Ezekiel Tyner, by whom it was afterwards assigned to the plaintiffs. Payment of the bill was refused at maturity, and it was protested for non-payment. Due notice was given.

The defendant pleaded eight pleas in bar of the action; the first, second, and fourth, being withdrawn, it is only necessary to notice the third, fifth, sixth, seventh, and eighth.

The third plea states that George Holland, who is one of the endorsers and co-sureties thereof, before the commencement of this suit, on the 21st day of December, 1854, fully paid the bill to the Richmond branch of the State Bank of Indiana, who was then and there the holder and owner of the same; and that the plaintiffs received the same after they became due, and were so paid.

This plea assumes that one of the endorsers and co-sureties paid the bill. In *McDonald v. Magruder*, (3 Peters, 470,) and in *Wilson v. Blackford*, (507,) the doctrine was laid down that co-sureties are bound to contribute equally to the debt they have jointly undertaken to pay; but the undertaking must be joint, not separate and successive. The liabilities must arise from the endorsements, and not from a distinct agreement to pay the face of the bill jointly; the plea does not necessarily import a joint undertaking; the facts on which the joint liability is founded must be stated. On the payment of the bill by the endorser, it does not cease to be assignable.

The allegations in the fifth plea are not sufficient to bar the action. Several of the matters so stated have no direct bearing on the points made. The various parties to an accommodation bill, where no con-

sideration has passed as among themselves, are not, unless

[* 438] by special agreement, bound to pay in * equal proportions

as co-sureties. The averments of the plea are defective in not stating there was an agreement between the drawers and indorsers of the bills of exchange to contribute equally in paying them.

Nor does the fact that the bills were assigned to the plaintiff as collateral security for a pre-existing debt, impair the plaintiff's right to recover.

The sixth plea alleges that no consideration passed between said drawer, acceptor, or endorsers, for said bills, and that the same remained in the hands of R. Tyner until negotiated by him to the Richmond Bank, for his benefit. And afterwards, and before said bills became due, to wit, on the first of October, 1854, R. Tyner, Tyner & Childers, and E. Tyner & Co., failed, and made a general assignment of their property, rights, &c., to Holland, Abner McCarty, and R. H. Tyner; and Holland accepted the trust, and became the active trustee; that the assignments were made for the debts and liabilities, first, to indemnify and save harmless Abner McCarty; second, to indemnify and save harmless Holland, said plaintiff, and N. D. Gallion, in proportion to their respective liabilities, and next for the payment of other debts and trusts. The property so assigned is averred to have been of the value of one hundred and fifty thousand dollars, and amply sufficient to pay the bills in suit, &c., and that Holland, on July 1, 1855, delivered said bills, endorsed in blank to said plaintiff, as collateral security for a pre-existing debt of Richard Tyner to said plaintiff, all of which was known to the plaintiff.

To this plea the plaintiff replied, that the said E. Tyner & Co. did not, each nor either of them, make an assignment of their property, rights, credits, or effects, to the said Holland, McCarty, and Tyner, as stated in sixth plea of the defendant; but it is true that the said Richard Tyner, in 1854, made an assignment of said property, rights, and effects, to the said Holland, McCarty, and Tyner, and in trust: first, to indemnify and save harmless the said Abner McCarty as a creditor and surety of the said Richard Tyner; second, to indemnify and save harmless the said Holland, N. D. Gallion, Ezekiel Tyner, and the said plaintiff, as creditors and securities; but the plaintiff * says the property, [* 439] rights, credits, and effects, so assigned to the said Holland, McCarty, and Richard H. Tyner, were and still are wholly insufficient in value to indemnify and save harmless the said McCarty as such creditor and surety, so that there are now no effects or money of the said R. Tyner from which the bill could be paid, or any part thereof.

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This replication was demurred to, but it was sufficient, and the demurrer was properly overruled.

In the seventh plea, which was amended, an agreement is alleged between the bank and Holland, that if Holland would give his notes to the bank, bearing six per cent. interest, with real and personal security, payable by installments on the 1st day of January, 1856, 1857, and 1858, the bank would extend the times of payment as above stated, which was agreed to by Holland, the bank being then the holder of the bills; and that this was done without the consent or knowledge of defendant. And it is further alleged that the above bills were, after due, delivered to said plaintiff by said Holland, as collateral security for a pre-existing liability of said Holland, and for no other consideration.

To this plea there was a demurrer on the ground that there was no agreement between Holland, E. Tyner & Co., and the defendant, that on the failure of Richard Tyner to pay the bills of exchange, Holland, E. Tyner & Co., and the defendant, jointly or in equal proportions, should pay them. There was no sufficient averment to this effect. The delivery of the bills to the plaintiff, as collateral security for a pre-existing debt, under the decision of *Swift v. Tyson*, was legal. The demurrer was properly sustained.

In his eighth plea, the defendant says that the bills of exchange, in the declaration mentioned, are one and the same identical bills, and not other or different; that defendant never endorsed but one bill of the amount and date stated. He further says, that the firm of Tyner & Childers consisted of Richard Tyner, James N. Tyner, and William Childers; and that of E. Tyner & Co., of Richard Tyner, and Ezekiel Tyner, and Childers, and that said R. Tyner drew said bill in the name of Tyner & Childers, and accepted the same in his own name, and endorsed the same in the name of E. Tyner & Co.; that each of the parties, with the said George Holland and this defendant, were, at the time of drawing, accepting, and endorsing, citizens of Indiana; that the bill of exchange was discounted by the said bank, and the proceeds paid to Richard Tyner; that said endorsers were co-sureties thereon; and it was understood the said defendants, the said George Holland and Ezekiel Tyner, were each to be co-sureties, and liable to pay a *pro rata* share of said bill; and each of said parties have, since the endorsing of said bill, admitted a liability, with the others, in case of insolvency of prior parties, for whose benefit said bill was so made to contribute towards payment.

And the defendant further says, that, before the bill became payable, the said Tyner & Childers, and the said R. Tyner and E.

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Tyner & Co., failed, and each of said firms made a general assignment of lands, goods, property, and effects, of the value of \$1,000 to \$5,000, to one H. J. Shirk: first, to pay depositors; second, debts for which A. McCarty and Holland were liable; and also for the payment of debts to plaintiffs, and liabilities to them, the said R. Tyner assigned property and effects, amounting in value to between \$60,000 and \$150,000, to Holland, McCarty, and R. Tyner, in trust; first, to indemnify and save harmless Abner McCarty; and, second, this defendant and George Holland, the said plaintiffs, and N. D. Gallion, in proportion to their respective liabilities for him, and then for payment of other debts upon other trusts; and Holland became active for the execution of the trust, and took up of the Richmond Bank the bill of which it was holder, and by giving new notes of the said Holland for this and other debts of the said Tyner and Holland, and others, amounting to over \$20,000, which sums were payable subsequently, with interest, and secured by mortgage on real estate conveyed by Holland to the bank, all of which was done without the consent or knowledge of the defendant.

And the defendant says that Holland, still being one of the trustees of said R. Tyner, and having property in his hands upon the trust aforesaid of greater value than the amount of the bills, afterwards, on the 1st of July, 1855, at the county *aforesaid, delivered said bills to the plaintiffs as collateral security for a pre-existing debt of the said R. Tyner, on which the said Holland was endorser. And the defendant says the moneys in said bills of exchange have not yet been paid by the said Holland, or any one on his behalf. To this plea there was a demurrer.

This plea but reiterates in effect the same defenses which have already been disposed of in deciding upon the demurrers before noticed, and it is not perceived how any additional force can be given to them by being grouped together in one plea.

The fact that these parties were accommodation endorsers does not make them co-sureties, bound to contribute equally to the payment of the bills, without a special agreement to that effect; and there is no sufficient averment that any such agreement existed.

The averments in regard to the assignment are also defective, for they nowhere show that Holland had, at any time, sufficient funds in his hands, after complying with the terms of the trust—viz: to save Abner McCarthy and others harmless—to pay this bill; and unless such a state of facts existed, there could be nothing in his hands made available for the bills.

If the fact should appear that the parties are bound to each other

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by a separate and distinct agreement, other than that which appears by the endorsements upon the bills, the plaintiff in error will have his remedy in an action of *indebitatus assumpsit* against the other parties to the bills. But we think the averments in the pleas noticed are wanting in precision, and do not bring the case within the rule of special agreements, which impose a joint obligation.

The demurrers are sustained, and the judgment is affirmed.

SAMUEL PEARCE, Plaintiff in Error, v. THE MADISON AND INDIANAPOLIS RAILROAD COMPANY and the PERU AND INDIANAPOLIS RAILROAD COMPANY.

21b 441
L-ed 184
131 386

21 H. 441.

CORPORATIONS—RIGHT TO CONSOLIDATE—RIGHT TO CONTRACT.

1. The two corporation defendants were incorporated to build two distinct lines of railroad into the city of Indianapolis. They had no right to consolidate into one company without legislative authority to do so.
2. Nor can corporations organized to build railroads buy steamboats to run in connection with their road, and the obligations given for the purchase by the company are void.

WRIT of error to the circuit court for the district of Indiana. The facts are stated in the opinion.

Mr. O. H. Smith and *Mr. Fox*, for plaintiff in error.

Mr. Hendricks, for defendants.

[* 442] * Mr. Justice CAMPBELL delivered the opinion of the court.

The defendants are separate corporations, existing under the laws of Indiana, and were created to construct distinct lines of railroad that connect at Indianapolis, in that State. The plaintiff is the assignee of five promissory notes, that were executed under conditions set forth in the declaration, and of which he had notice. The two corporations, (defendants,) some time before the date of the notes, were consolidated by agreement, and assumed the name of the Madison, Indianapolis, and Peru Railroad Company, and under that name, and under a common board of management, conducted the business of both lines of road.

While the business of the two corporations was thus directed and managed, the president of the consolidated company gave these notes in its name in payment for a steamboat, which was to be employed on the Ohio river, to run in connection with the railroads. After the execution of the notes, and the acquisition of the boat,

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this relation between the corporations was dissolved by due course of law, and, at the commencement of the suit, each corporation was managing its own affairs. The plaintiff claims that the two corporations are jointly bound for the payment of the notes, but the circuit court sustained a demurrer to the declaration.

The rights, duties, and obligations of the defendants are defined in the acts of the legislature of Indiana under which they were organized, and reference must be had to these, to *ascertain [* 443] the validity of their contracts. They empower the defendants respectively to do all that was necessary to construct and put in operation a railroad between the cities which are named in the acts of incorporation. There was no authority of law to consolidate these corporations, and to place both under the same management, or to subject the capital of the one to answer for the liabilities of the other; and so the courts of Indiana have determined. But in addition to that act of illegality, the managers of these corporations established a steamboat line to run in connection with the railroads, and thereby diverted their capital from the objects contemplated by their charters, and exposed it to perils, for which they afforded no sanction. Now, persons dealing with the managers of a corporation must take notice of the limitations imposed upon their authority by the act of incorporation. Their powers are conceded in consideration of the advantage the public is to receive from their discreet and intelligent employment, and the public have an interest that neither the managers nor stockholders of the corporation shall transcend their authority. In *McGregor v. The Official Manager of the Deal and Dover Railway Co.*, (16 L. and Eq. 180,) it was considered that a railway company incorporated by act of parliament was bound to apply all the funds of the company for the purposes directed and provided for by the act, and for no other purpose whatever, and that a contract to do something beyond these was a contract to do an illegal act, the illegality of which, appearing by the provisions of a public act of parliament, must be taken to be known to the whole world. In *Coleman v. The Eastern Counties Railway Company*, (10 Beav. 1,) Lord Langdale, at the suit of a shareholder, restrained the corporation from using its funds to establish a steam communication between the terminus of the road (Harwich) and the northern ports of Europe. The directors of the company vindicated the appropriation as beneficial to the company, and that similar arrangements were not unusual among railway companies. Lord Langdale said: "Ample powers are given for the purpose of constructing and maintaining the railway, and for doing all those things required for its

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proper use when made. But I apprehend that it has [* 444] nowhere * been stated that a railway company, as such, has power to enter into all sorts of other transactions. Indeed, it has been very properly admitted that railway companies have no right to enter into new trades or businesses not pointed out by the acts. But it has been contended that they have a right to pledge, without limit, the funds of the company for the encouragement of other transactions, however various and extensive, provided that the object of that liability is to increase the traffic upon the railway, and thereby to increase the profit to the shareholders.

"There is, however, no authority for anything of that kind. It has been stated that these things, to a small extent, have been frequently done since the establishment of railways; but unless the acts so done can be proved to be in conformity with the powers given by the special acts of parliament, under which those acts are done, they furnish no authority whatever. In the *East Anglian Railway Company v. The Eastern Counties Railway Company*, (11 C. B. 803,) the court say the statute incorporating the defendants' company gives no authority respecting the bills in parliament promoted by the plaintiffs, and we are therefore bound to say that any contract relating to such bills is not justified by the act of parliament, is not within the scope of the authority of the company as a corporation, and is therefore void."

We have selected these cases to illustrate the principle upon which the decision of this case has been made. It is not a new principle in the jurisprudence of this court. It was declared in the early case of *Head v. Providence Insurance Company*, (2 Cr. 127,) and has been reaffirmed in a number of others that followed it. (*Bank of Augusta v. Earle*, 13 Pet. 519; *Perrine v. Ches. and Ohio Railroad Company*, 9 How. 172.)

It is contended, that because the steamboat was delivered to the defendants, and has been converted to their use, they are responsible. It is enough to say, in reply to this, that the plaintiff was not the owner of the boat, nor does he claim under an assignment of the owner's interest. His suit is instituted on the notes, as an endorsee; and the only question is, had the corporation [* 445] the capacity to make the contract, in * the fulfillment of which they were executed? The opinion of the court is, that it was a departure from the business of the corporation, and that their officers exceeded their authority. Judgment affirmed.

THE UNITED STATES, Appellants, v. CHARLES FOSSATT.

21 H. 445.

CALIFORNIA LAND GRANTS—FINAL DECREE.

21h 445
L-ed 186
180 262

1. Under the act of March 3, 1851, concerning private land claims in California, an appeal may be had to this court from the decree of the district court confirming or rejecting the claim, and another appeal from a subsequent decree rendered after it is remanded from this court ascertaining the boundaries.
2. But this last decree must be conclusive as to the boundaries, which is not the case when only three sides of the grant are given, and the survey has not been made or completed.
3. The district court has power to compel the completion of a survey according to its decree; and until this is done there is no final decree on the question of boundary, in case where a survey is necessary, from which an appeal lies.

At the suggestion of the court, as to a doubt of the right to an appeal in this case, that question was argued on a motion to dismiss.

Mr. Bayard and *Mr. Nelson*, for the motion.

Mr. Black, attorney general, and *Mr. Reverdy Johnson*, against it.

*Upon this motion, Mr. Chief Justice TANEY delivered [* 446] the opinion of the court.

According to the rules and practice of the court, no case can be taken up out of its order on the docket, where private interests only are concerned. The only cases in which they will depart from this rule are those where the question in dispute will embarrass the operations of the government while it remains unsettled. But when a case is sent to the court below by a mandate from this court, no appeal will lie from any order or decision of the court until it has passed its final decree in the case. And if the court does not proceed to execute the mandate, or disobeys and mistakes its meaning, the party aggrieved may, by motion for a *mandamus*, at any time, bring the errors or omissions of the inferior court before this court for correction. Upon looking into the record in the case of *United States v. Fossatt*, the court doubt whether there has been a final decision under the mandate, and whether the present appeal ought not to be dismissed on that ground. If there is no final decree, the proceedings of the court below cannot be interrupted by an appeal from interlocutory proceedings.

The court therefore desire to hear the counsel upon the question, whether the decree in question is final, upon motion to dismiss, and will hear the argument on Monday, March 7th.

Mr. Justice CAMPBELL delivered the opinion of the court.

This cause came before this court by appeal from the district

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court of the United States for the northern district of California, and was decided at the last term, and is reported in 20 How. 413.

The court determined:

“That a grant under which the plaintiff claimed land in California was valid for one league, to be taken within the [* 447] * southern, western, and eastern boundaries designated therein, at the election of the grantee and his assigns, under the restrictions established for the location and survey of private land claims in California by the executive department of the government. The external boundaries of the grant may be declared by the district court from the evidence on file, and such other evidence as may be produced before it; and the claim of an interest equal to three-fourths of the land granted is confirmed to the appellee.”

The district court, in conformity with the directions of the decree, declared the external lines on three sides of the tract claimed, leaving the other line to be completed by a survey to be made. From the decree, in this form, the United States have appealed.

A motion has been submitted to the court for the dismissal of the appeal, because the decree of the district court is interlocutory, not final.

This motion is resisted, because the inquiries and decrees of the board of commissioners for the settlement of private land claims in California, by the act of 3d March, 1851, (9 S. at L. 632,) in the first instance, and of the courts of the United States on appeal, relate only to the question of the validity of the claim—and by validity is meant its authenticity, legality, and in some cases interpretation, but does not include any question of location, extent, or boundary—and that the district court has gone to the full limit of its jurisdiction in the decree under consideration, if it has not already exceeded it.

The matter submitted by congress to the inquiry and determination of the board of commissioners, by the act of 3d March, 1851, (9 Stat. at Large, 632, sec. 8,) and to the courts of the United States on appeal, by that act and the act of 31st August, 1852, (10 Stat. at Large, 99, sec. 12,) are the claims “of each and every person in California, by virtue of any right or title derived from the Spanish or Mexican government.” And it will be at once understood that these comprehend all private claims to land in California.

The effect of the inquiry and decision of these tribunals upon the matter submitted is final and conclusive. If unfavorable [* 448] to the claimant, the land “shall be deemed, held,

and considered, as a part of the public domain of the United States;" but if favorable, the decrees rendered by the commissioners or the courts "shall be conclusive between the United States and the claimants."

These acts of congress do not create a voluntary jurisdiction, that the claimant may seek or decline. All claims to land that are withheld from the board of commissioners during the legal term for presentation, are treated as non-existing, and the land as belonging to the public domain.

Thus it appears that the right and title of the inhabitants of California, at the date of the treaty of Guadalupe Hidalgo, to land within its limits, with the exception of some within the limits of a pueblo or corporation described in the 14th section of the act of 3d March, 1851, must undergo the scrutiny of this board, and that its decisions are subject to review in the district and supreme courts. This jurisdiction comprehends every species of title or right, whether inchoate or complete; whether resting in contract or evinced by authentic act and judicial possession.

The object of this inquiry was not to discover forfeitures or to enforce rigorous conditions. The declared purpose was to authenticate titles, and to afford the solid guarantee to rights which ensues from their full acknowledgment by the supreme authority. The tribunals were therefore enjoined to proceed promptly, and to render judgment upon the pleadings and evidence; and in deciding, they were to be governed by the laws of nations, the stipulations of the treaty of Guadalupe Hidalgo, the laws, usages, and customs of the government from which the claim is derived, the principles of equity, and the decisions of the supreme court of the United States in similar cases.

What are the questions involved in the inquiry into the validity of a claim to land?

It is obvious that the answer to this question must depend, in a great measure, upon the state and condition of the evidence. It may present questions of the genuineness and authenticity of the title, and whether the evidence is forged or fraudulent; or, it may involve an inquiry into the authority of *the [* 449] officer to make a grant, or whether he was in the exercise of the faculties of his office when it was made; or, it may disclose questions of the capacity of the grantee to take, or whether the claim has been abandoned or is a subsisting title, or has been forfeited for a breach of conditions. Questions of each kind here mentioned have been considered by the court in cases arising under this law.

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But, in addition to these questions upon the validity of the title, there may arise questions of extent, quantity, location, boundary, and legal operation, that are equally essential in determining the validity of the claim.

In affirming a claim to land under a Spanish or Mexican grant, to be valid within the law of nations, the stipulations of the treaty of Guadalupe Hidalgo, and the usages of those governments, we imply something more than that certain papers are genuine, legal, and translativ of property. We affirm that ownership and possession of land of definite boundaries rightfully attach to the grantee.

In the case of the *United States v. Arredondo*, (6 Pet. 691,) the inquiries of this court, beside those affirming the legality of the grant, extended to questions of forfeiture for the non-fulfillment of conditions, the inalienability of lands in possession of an Indian tribe, and fraud. The superior court of Florida in that suit directed that the land should be surveyed, in the form of a square, with a designated monument as the centre. This court annulled that decree, and ascertained another as the central point. The appeal in *Mitchell v. United States* (15 Pet. 52) was taken in a case that had been decided here, and in which an issue upon the decree that succeeded the mandate of this court, and made in execution of it, subsequently arose. Certain property about Fort St. Mark's was excepted in the original decree of confirmation, and reserved to the United States, and the superior court in that decree was directed to ascertain the extent and boundaries of the land reserved. This was done and the land specifically described, and on appeal this decree was affirmed.

These questions arose upon an act of congress that required the courts, "by a final decree, to settle and determine the [* 450] question * of the validity of the title according to the law of nations, the stipulations of any treaty and proceedings under the same, the several acts of congress in relation thereto, and the laws and ordinances of the government from which it is alleged to have been derived." This act enumerates as proper to be heard and decided, preliminary to such a decree, questions of extent, location, and boundary. (4 Stat. at L. 52, sec. 2.)

It is asserted on the part of the appellants that the district court has no means to ascertain the specific boundaries of a confirmed claim, and no power to enforce the execution of its decree, and consequently cannot proceed further in the cause than it has done.

The 13th section of the act of 3d March, 1851, makes it the duty of the surveyor general to cause all private claims which shall be finally confirmed to be accurately surveyed, and to furnish plats

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of the same. It was the practice under the acts of 1824 and 1828, (4 Stat. at L. 52, 284,) for the court to direct their mandates specifically to the surveyor designated in those acts. And in the case *Ex parte Sibbald v. United States*, (12 Pet. 488,) the duty of the surveyor to fulfill the decree of the court, and the power of the court to enforce the discharge of that duty, are declared and maintained. The duties of the surveyor begin under the same conditions, and are declared in similar language, in the acts of 1824, 1828, and of 1851.

The opinion of the court is, that the power of the district court over the cause, under the acts of congress, does not terminate until the issue of a patent, conformably to the decree.

In the exercise of the jurisdiction conferred by this act, and acts of a similar character, this court has habitually revised decrees of the district court, which were not final decrees under the judiciary act of 1789. The court has uniformly accepted, in the first instance, as a final decree, one that ascertained the authenticity of the claimant's title, and declared, in general terms, its operation, leaving the questions of boundary and location to be settled subsequently. This practice was approved in the case last cited. The peculiar nature of these cases rendered such a relaxation of the rules of proceeding of the court appropriate. The United States did not appear in *the courts as a contentious litigant; but [*451] as a great nation, acknowledging their obligation to recognize as valid every authentic title, and soliciting exact information to direct their executive government to comply with that obligation.

They had instrumentalities adequate to the fulfillment of their engagements without delay, whenever their existence was duly ascertained. There was no occasion for the strict rules of proceeding that experience has suggested to secure a speedy and exact administration between suitors of a different character. And it has rarely occurred that the same case has reappeared in the court after the first decree. If the litigation had been other than it was, the rule of proceeding would have varied with it.

But, after the authenticity of the grant is ascertained in this court, and a reference has been made to the district court, to determine the external bounds of the grant, in order that the final confirmation may be made, we cannot understand upon what principle an appeal can be claimed until the whole of the directions of this court are complied with, and that decree made. It would lead to vexatious and unjust delays to sanction such a practice. It is the opinion of the court that this appeal was improvidently taken and allowed, and must be dismissed; and that the district court

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proceed to ascertain the external lines of the land confirmed to the appellee, and enter a final decree of confirmation of that land.

THE STEAMBOAT R. L. MABEY.

RUSSELL STURGIS, Libellant and Appellant, v. JOHN CLOUGH and others.

21 H. 451.

ADMIRALTY—RULES GOVERNING TUGS IN APPROACHING A VESSEL IN NEW YORK HARBOR.

1. It is the established rule for tugs in the harbor of New York to offer their services by approaching in the wake of the vessel, and to come up on the starboard quarter and slack her engine, so as not to pass her.* Tugs approaching in any other direction must round to, so as to head the same way as the vessel.
2. The Mabey, in this case, meeting the brig at an acute angle, run into the other tug, the Hector, which was approaching from the rear, according to the rule. As the collision was due to the violation by the Mabey of the rule which required her to round to and approach with her head in the same direction as the vessel, she must be held to pay the damages of the collision.

APPEAL from the circuit court for the southern district of New York.

The suit was originally brought in the district court by the owner of the tug Hector against the tug Mabey, and that court dismissed the libel. On appeal to the circuit court, the decree was affirmed.

The facts of the case are well stated in the opinion.

Mr. Benedict, for appellant.

Mr. McMahon, for appellees.

[* 452] * Mr. Justice GRIER delivered the opinion of the court.

The libellant in this case is owner of a steam-tug called the Zachary Taylor, or Hector.

The claimants are owners of the steam-tug Mabey.

At the time of this collision, on the 11th of August, 1854, they were both engaged in the business of towing vessels into the port of New York from the neighborhood of Sandy Hook.

The Hector was an old, heavy boat, some one hundred and eighty or one hundred and ninety feet long; the Mabey a new, light boat, of about one hundred feet in length, and much the swifter of the two, in the ratio of about fourteen to eight.

[* 453] * They were each looking out for employment about noon of that day, when the brig Wanderer was passing

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in, by Sandy Hook, sailing slowly in a northwest course. The two steam-tugs must have been some two or three miles apart, when they each started for the brig in different directions, in order to tender their services. Each boat put on all its steam, as the first who could hail the brig would be entitled to the job.

The Hector, being in the rear, came up in the wake of the brig, and nearly on her course. The Mabey came in S. S. E. course, meeting the brig in an acute angle to its course. As they came together near the starboard quarter of the brig, their respective distances from her at the time of starting must have been in the ratio of their velocities. The Mabey, being much the fastest boat, no doubt expected to make up for this difference of distance by her superior fleetness.

According to the established rules for navigating boats under such circumstances, the Hector, which was following in the wake of the brig, should come up on her starboard quarter, and slack her engine, so as not to pass the brig. The Mabey, which was coming down in the opposite direction, ought to round to, either to windward or leeward, so as to head the same way as the brig. Had these well-known rules been observed, no collision would have occurred in consequence of the race for precedence.

Cases may occur in which two steamboats engaged in unlawful racing may recklessly or willfully dash against each other; and the courts, treating them both as criminals, may refuse to sustain an action or decide which was most to blame, leaving each to suffer the consequences of his own folly and recklessness.

We do not think that the testimony shows this to be such a case. Each of these boats had a right to move as fast as it could in order to obtain precedence, and each had a right to expect that the other would pursue the customary and proper course in navigating their vessels, in such circumstances, by the observance of which there would be no danger of collision.

Have both these boats, in their anxiety for precedence, disregarded the proper precautions to avoid a collision, or is the * fault wholly to be attributed to the mismanagement of [* 454] the Mabey?

The defense set up in the answer, that the Mabey "got to the brig first, slacked her speed, slowed and stopped, and that the Hector attempted to pass under the bows of the Mabey, and in executing that manœuvre, with the covetous desire of getting the right to tow the brig, she ran against the Mabey, obliquely," &c., is clearly and satisfactorily proven to be not true. The fact that the stem of the Mabey, the lighter and swifter boat, was driven

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into the starboard bow of the Hector, stripping her guards down to the wheel, shows conclusively that the Mabey was not stopped, but was under nearly full headway.

If the collision had occurred as stated in the answer, the great momentum of the larger boat would most probably have sunk the smaller.

The witnesses on the Hector all concur that, though the engineer was directed to proceed with his utmost dispatch, the Hector followed in the wake of the brig, and when near to her had slackened her speed and stopped her wheel, so as to lap on the stern of the brig as she came alongside of her starboard quarter, and within twenty feet of her; and that she was nearly at rest when the Mabey ran, with all her force, into the starboard bow of the Hector. As these witnesses are all confirmed by the pilot of the brig, who was an impartial observer of the whole transaction, his statement may be fairly taken as a correct representation of it.

He states that he first saw the Hector about a mile distant, heading towards the brig, about northwest; that she came up to the brig in about ten minutes, stopped her engine when she came within one hundred to two hundred yards of the brig, and then came alongside with the way she had on; and the captain spoke to the witness. That the brig was going at the rate of about a mile an hour, and the Hector was dropping astern, if anything, when the Mabey ran into her.

That, when he first observed the Mabey, she was about half a mile off, coming southwest or west-southwest; that she was about an eighth of a mile from the brig when the Hector let [* 455] * her steam off; that she continued her course till she struck the starboard bow of the Hector, and ran into her forward of the wheel-house; that, when the pilot of the Mabey discovered that he had run his boat so as to render a collision inevitable, he ran out of the pilot-house and went aft; that the wheels of the Mabey were in motion till the time of the collision; that the Hector could do nothing to avoid the collision, because she had stopped her engine and was falling behind the brig.

The master of the Hector acted on the supposition that the Mabey, according to custom, would round to, and could not anticipate that, contrary to all rule, she would run into the Hector, as she lay nearly at rest, lapping on the stern of the brig, when a single turn of her wheel, with her great headway, would have run her entirely clear of any danger of collision. Hence, when his pilot told him the Mabey was coming in a direction to run into him, he said, "No, she will go under our stern." He presumed, and had

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a right to presume, that the pilot of the *Mabey* knew his duty, and intended to round to behind the stern of the brig and tug, and not make the reckless attempt to run between them.

The testimony of the pilot of the *Mabey*, in fact, confirms this view of the case, and shows the collision to have been occasioned entirely by his own fault, or that of the master, who directed him. He says, "My instruction was to run close to the brig's stern." The master says, "He expected the *Hector* would get out of his way;" and the pilot says, "I *supposed* she would go on the other quarter, or else steer outside of me." In other words, he proceeded in a direction which he knew must produce a collision unless the *Hector* would get out of his way. It is clear that his intention was to drive the *Hector* away from the brig, or compel her to take the consequences. The pilot admits, also, that he knew the proper way to approach the brig was by rounding to; which would not have brought him within three hundred feet of the point of collision. He admits, also, that he could have gone on either side of the brig, and "knew it was nautical and customary to come up on the weather quarter, and to round to for a tow, but he had instructions *from the captain to go for the brig, and to [* 456] get there before the *Hector* if he could."

We are of opinion, therefore, that the evidence clearly shows that this collision was occasioned wholly through the fault of the master and pilot of the *Mabey*.

The decree of the circuit court is therefore reversed, with costs, and the record remitted with instructions to enter a decree in favor of libellant, and have such further proceedings as to justice and right may appertain.

THE WESTERN TELEGRAPH COMPANY, Appellants, v. THE MAGNETIC TELEGRAPH COMPANY and others.

21 H. 456.

EQUITY—CONTRACT—PATENTS.

A contract for the use of Morse's patent for telegraphing over lines between certain points does not prevent other parties from conveying messages between the same points, if carried over other and more circuitous routes—the contract for the use of the patent containing nothing which forbid this to be done.

APPEAL from the circuit court for the district of Maryland.

The case is sufficiently stated in the opinion.

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Mr. McLean, for appellants.

No counsel for appellees.

[* 457] *Mr. Justice McLEAN delivered the opinion of the court.
This is an appeal from the circuit court of the United States for the district of Maryland.

On the 30th of April, 1849, a contract was entered into between Amos Kendall, as attorney in fact for Samuel F. B. Morse and Alfred Vail of the first part, and the Western Telegraph Company of the second part.

In the agreement, it was stated that the United States had heretofore granted to Samuel F. B. Morse letters patent for [* 458] the *magnetic telegraph, known as Morse's telegraph; and that the said Morse subsequently assigned a portion of his interest in the said letters patent to Alfred and Leonard V. Gale; and the said Morse, Gale, and Vail, subsequently, by letters of attorney, recorded among the transfers of patent rights, constituted Amos Kendall their true and lawful attorney, for them and in their behalf, &c. And whereas the said Western Telegraph Company are desirous to obtain, in due form, the privileges of said letters patent for lines of telegraph belonging to them between Baltimore and Wheeling, with a branch therefrom to Washington city, and a branch from Brownsville to the city of Pittsburg:

Now, the said Amos Kendall, in consideration of thirty-six thousand dollars paid to him in the stock certificates of the Western Telegraph Company, hath, as far as he possesses legal authority, by virtue of the power of attorney aforesaid, or otherwise, granted, assigned, and conveyed, to the Western Telegraph Company, the full and exclusive right to use the invention of the said Morse, secured by letters patent on the said lines from Baltimore to Wheeling, with branches to Washington and Pittsburg, respectively, for the remainder of the time yet to come in the said letters patent, with the benefit of any extensions and renewals thereof, it being understood that the right granted is to be for one wire only, unless with the consent of the patentee.

And Francis O. J. Smith conveyed his right to the Western Telegraph Company's existing lines from Baltimore, in the State of Maryland, to Wheeling, in the State of Virginia, and in branches to Washington and Pittsburg cities, in full right, on the 27th of March, 1857.

These conveyances vested in the Western Telegraph Company all the right which the patentee had, on the conditions stated, to use and enjoy the lines designated for the transmission of telegraphic

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messages, in as full and ample a manner as the patentee could himself have enjoyed, had no assignment of his right been made.

But it is alleged that another assignment of Morse's patent was made to a company from Pittsburg to Philadelphia, and * to another company from Harrisburg to Baltimore, and [* 459] that, by conspiring with those companies, the Magnetic Company has taken messages at Philadelphia, sent from Pittsburg and Wheeling, directed to Baltimore and Washington, and other similar messages from the Harrisburg line directed to Washington; and also messages from Washington and Baltimore, by Philadelphia and Harrisburg, to Wheeling and Pittsburg, and through those points to points further west; and that this was done by uniting the lines or working them together, under a contract, in order that they might get, in conjunction with the other companies, the whole of the business between those points.

The complainants do not seem to be well advised as to what means of combination, conspiracy, or contract, the injury complained of has been done; but they charge that, by the means alleged, their lines have in a degree been destroyed. They are only able to say that the business on their lines has been diverted by the Magnetic lines. And the equitable powers of the court are invoked against the injuries complained of.

The bill does not allege any direct infringement of the patent owned by the Western Telegraph Company by the Magnetic Company. Those are free to transmit any messages that may be forwarded on them. But the complaint seems to be, that at the points where the operations of the Western Telegraph cease, whether it be east, north, or west, the messages are not forwarded by the Western Telegraph, but they are, by the means used, diverted from those lines, and sent by circuitous routes, or at least by lines of increased length.

It must be expected that great competition will exist in the transmission of intelligence, where telegraphic lines have been established throughout the country. But it would be difficult to find a remedy for these evils, whether real or supposed, which are not founded on contract. It was in the power of the Western Telegraph Company to form connections with other lines, so as to secure uninterrupted communications. But if these precautions have not been observed, and a supposed convenience or dispatch has been deemed a sufficient security for the co-operation of the lines connected with the Western Telegraph * Company, [* 460] and no contract, express or implied, is shown, the complainant is without remedy.

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Men, unless legally bound to certain duties, may, from whim or caprice, indulge their supposed interests or resentments without responsibility. Unless certain rates of transmitting intelligence have been established, a reduction of such rates, whether done secretly or publicly, will affect the profits on other lines.

Nothing set up in the bill, in the form of a contract, entitles the complainant to relief. A choice of lines may well be exercised, if there be no violation of the patent, although the circuitous line passes over a greater distance, as this can be no ground of complaint. It violates no contract, and almost necessarily grows out of the competition in this branch of business.

From the facts stated in the bill, there seems to be no ground for relief. Judgment affirmed.

WESTERN TELEGRAPH COMPANY, Appellants, v. PENNIMAN and KING.

21 H. 460.

THERE is no difference between this case and the foregoing, except in the names of the parties.

Mr. Justice McLEAN delivered the opinion of the court.

This case is before us by an appeal from the circuit court of the United States for the district of Maryland.

The Western Telegraph Company, a corporation incorporated by the States of Maryland, Virginia, and Pennsylvania, have filed their bill against George C. Penniman and John King, citizens of Maryland, and charges them with the violation of the patented rights of the Western Telegraph Company, * under a contract made with Morse, Vail, and Smith, dated the 8th of March, 1840. The above-named persons are alleged to be the sole proprietors of the right to construct and use Morse's electro-magnetic telegraph, by him invented and patented, on the route between Baltimore, in the State of Maryland, and New York and Harrisburg, in the State of Pennsylvania, for and in consideration of thirty dollars per mile, by the route on which the telegraph has been or may be constructed, between the points or places aforesaid. And said right, through their agent, Amos Kendall, was conveyed unto John C. Penniman and his assigns, to construct between the points or places aforesaid the said telegraph, with one or more wires, with the apparatus for working the same and the improvements therein. And the said Morse & Co. covenant not to grant to

any other person or persons the right to construct any other line of telegraph under the patent aforesaid, within the aforesaid limits, either in a direct or indirect line.

The contract between Kendall, as attorney of Morse and Vail, with the Western Telegraph Company, granted to it in due form the privileges of said letters patent for lines of telegraph belonging to it, between Baltimore and Wheeling, with a branch therefrom to Washington city, and a branch from Brownsville to the city of Pittsburg, &c. ; and the right of Francis O. J. Smith, which was also conveyed, was limited to the Western Telegraph Company's existing lines from Baltimore, in the State of Maryland, to Wheeling, in the State of Virginia, and in branches to Washington and Pittsburg cities ; the right herein conveyed and so limited by said territorial termini being one-fourth part of said invention and letters patent, &c.

The complainants pray for an injunction, and that an account may be taken, for a breach of its patent privileges.

The defendants procured an assignment of Morse's patented electro-telegraph between the cities of Baltimore and Harrisburg, and afterwards a like assignment from him between Baltimore and Wheeling, with the right of a branch to Pittsburg and Washington ; and it is alleged that complainants claim the right to telegraphic business on the Morse plan between * those [* 462] points ; not only all that commence and end at these several points, but all that, starting at remote points, has to reach either of those points by coming through either of the others.

There can be no doubt that the right of transmitting on the lines conveyed to the Western Telegraph Company are as full and ample as would have been the rights of the patentee, had he never assigned them.

The assignment of Morse's to a company from Pittsburg to Philadelphia, and from Washington to Baltimore, Philadelphia, and New York, it is alleged, has enabled the defendants to take messages at Harrisburg from Wheeling, directed to Baltimore and Washington, and other southern points ; and has also, in like manner, taken messages from the Magnetic Company between Washington and New York at Baltimore, and transit them to Pittsburg, and to points west, through Pittsburg. And this was done, it is said, in conjunction with the said companies, in order to get the business which, but for said combination, would and ought to have come by the complainant's line.

The charges against Penniman and King are, substantially, the same combinations as charged against the agents of the Magnetic

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Company; and we can only say, as was said in the other case, the assignees may claim a protection in all the rights assigned to them; and if, in any respect, their patent has been infringed, a remedy is open to them. But it does not appear that the defendants were limited as to the use of the lines owned by the Western Telegraph Company, although the points on their lines were shortest. Each person, in using a telegraph line, is free to select his own conveyance. There are several things which recommend telegraphic lines. The machinery should be kept in proper order; strict attention should be given to the transmission of messages, and competent persons engaged in the office. Where there is much competition, great energy is required; and if this be wanting, success may not be expected.

The principal ground of complaint in the bill is, that the business of the Western Telegraph Company has been diverted [* 463] * from it, and thrown upon other lines, greatly to its injury, and it would seem that circuitous routes have been selected, rather than the more direct ones. If this be so, does it afford a ground for relief? There is no obligation on a person sending a telegraphic message to select the shortest or the longest line. He may consult his own interest or choice in such a matter, and he incurs no responsibility to any one, unless he has entered into a contract to forward all such messages on a particular line. No such allegation is contained in the bill, and there is no charge that the Western Telegraph Company has been molested in the exercise of its patented rights, except by the transfer of its business to other lines; and it is not alleged that these lines are prohibited from carrying messages by reason of their contiguity to the plaintiffs' lines.

Judgment affirmed.

JAMES C. CONVERSE, Administrator, &c., Plaintiff in Error, v. THE UNITED STATES.

21 H. 463.

COMPENSATION FOR EXTRA SERVICES TO COLLECTORS OF THE CUSTOMS

On examination of all the statutes concerning compensation for extra services from the act of May 7, 1822, to those of 1851, 1852, and 1853, in the appropriation bills of those years, the court comes to the following conclusions:

1. No allowance can be made by a head of a department to any officer beyond his fixed compensation, except for duties required to be performed by law, and for which the law has fixed a certain compensation.

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2. That the services for which this compensation is allowed must be such as have no connection with the duties of the office he holds.
3. The law authorized the secretary of the treasury to employ an agent to make contracts, purchase supplies, and disburse the money to be used on the light-house service, and it fixed the compensation at two and a half per cent. upon the amount of the disbursements.
4. Though the secretary might have imposed upon the collector of the port of Boston these duties, so far as they related to the light-houses within his district, without extra compensation, he had no right to do so as regards all the light-houses in the United States. This duty was not one connected with or growing out of his office of collector of the port of Boston.
5. Hence, for such a service the collector is entitled, as any other agent would be, to the commission which the law allows for it; and the acts aforesaid, rightly construed, do not forbid it.

WRIT of error to the circuit court for Massachusetts.

Mr. Russell and *Mr. Cushing*, for plaintiff in error.

Mr. Stanton and *Mr. Black*, attorney general, for United States.

* Mr. Chief Justice TANEX delivered the opinion of the [*464] court.

This is a writ of error to the circuit court of the United States for the district of Massachusetts.

The pleadings and facts in the case, and the points in controversy, are briefly yet clearly stated in the exception and opinion of the court, as set forth in the transcript, in the following words:

“Be it remembered, that at a term of the circuit court of the United States, holden at Boston, within and for the district of Massachusetts, on the 15th day of May, 1857, by the Honorable Benjamin R. Curtis, circuit judge, and the Honorable Peleg Sprague, district judge, came the United States of America, and by an action of assumpsit declared against James C. *Con- [*465] verse, of Boston, in said district, as he is administrator of the goods and estate of Philip Greely, jun., late of said Boston, deceased, and late collector of customs at said Boston, in said district, as by the writ and declaration of record will appear; to which the defendant pleaded the general issue, and filed certain claims in set-off, as by said set-off of record will appear; and the plaintiffs joined in said issue, and thereupon said cause came on for trial before the said circuit court, at said May term, before a jury impaneled for that purpose, and the said defendant then and there claimed to be allowed, among other things in set-off against the plaintiffs' claim, the sum of seventeen thousand six hundred and eighty-four dollars and ninety-two cents, (\$17,684.92,) as commissions due him from the plaintiffs upon certain contracts, purchases, and disbursements,

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made by him for oil and other articles for the light-house service of the United States, under direction of the secretary of the treasury.

“At the trial it appeared by the transcript from the treasury department of the plaintiffs, introduced by them in evidence, that said claims had been duly and properly presented by the defendant’s intestate, Mr. Greely, at the treasury department, for credit and allowance, and had there been disallowed, and no objection was made by the plaintiffs to the defendant’s right to recover of the plaintiffs upon this ground.

“It also appeared that the defendant’s intestate, as collector, had, during each year he was collector, received the compensation of six thousand dollars, and also the sum of four hundred dollars allowed by law.

“No question was made as to the amount of commissions claimed. The plaintiffs, in their transcripts, admit that the sum of \$17,684,92 is two and a half per cent. commission upon the defendant’s disbursements for light-house purposes during his term of office, and no objection was made that that is not the proper commission, if the defendant is entitled to any.

“It was further admitted that the defendant was, from May 1st, 1849, to April 1st, 1853, superintendent of lights and disbursing agent for the district of Boston.

“The duties of this office, it was offered to prove, were [* 466] the * charge and superintendence of all light-houses between Eastham and Plum Island, Newburyport, including the making of all necessary disbursements for the payment of the keepers’ salaries, wages of men, repairs, and the necessary supplies, in the same manner as other superintendents and disbursing agents in their respective districts.

“The defendant then offered to prove the following facts in regard to these disbursements upon which the aforesaid commission was claimed.

“The secretary of the treasury, or the proper officer under him, during the whole term of the defendant’s office, was accustomed from time to time to send specific orders to him to advertise for proposals, make contracts for and purchase all the oil, lamps, wicks, and supplies of every kind, required for the whole light-house service of the United States, as well that of the sea coasts as the lakes and rivers.

“Agreeably to such orders or requests, the defendant did, from time to time, make all these contracts and purchases, draw the necessary contracts, and all payments and disbursements thereunder and therefor, take charge of the property when purchased, and

distribute the same in such quantities and to such points, all over the United States, as were required or directed by the treasury department. These services involved much time, labor, and responsibility, on the part of the defendant, and were performed at the request and upon the order of the treasury department. The defendant paid out no moneys which have not been allowed.

“And it was upon all disbursements thus made that he claimed the aforesaid two and a half per cent. commissions, amounting to \$17,684.92.

“The plaintiffs objected to this evidence, because they said, admitting all that was thus proposed to be proved, it gave the defendant no claim whatever to the commissions claimed.

“The court thereupon, after consideration, ruled and decided that, admitting all that the defendant thus offered to prove to be true and as alleged, yet the defendant had no rightful claim against the plaintiffs to the said commissions, or any part thereof, and could not recover the same in set-off, but that the defendant, *being the collector of customs, and, as such, [*467] having received the aforesaid compensation of \$6,000 and of \$400 each year, could not recover any sum whatever for the commissions claimed as aforesaid; and the court thereupon refused to admit the evidence offered, and instructed the jury in accordance with said ruling, and for the reasons therein stated, that the defendant could not recover for said commission.

“To which ruling, decision, and instruction, the defendant then and there excepted.”

The question to be decided on this exception is undoubtedly one of some difficulty. But the difficulty arises not so much from ambiguity of language in any one of the acts of congress, as from the great number of acts passed from time to time on this subject, which have been referred to in the argument. They, for the most part, differ in language in some degree from one another, and are generally introduced in some clause or proviso of the usual annual appropriation law, or an appropriation to provide for previous expenditures, and yet all bear, with more or less force, on the question before us.

The acts referred to are: 1822, 3 Stat. 696; 1839, 3 Stat. 439; 1841, 5 Stat. 432; 1842, 5 Stat. 510; 1845, 5 Stat. 736; 1848, 9 Stat. 297; 1849, 9 Stat. 365, 367; 1850, 9 Stat. 504, 542, 543; 1851, 9 Stat. 629; 1852, 10 Stat. 97, 100; 1852, 10 Stat. 119, 120.

It is obvious, therefore, that in order to carry into execution the intention of the legislative department of the government, these various laws on the same subject-matter must be taken together

and construed in connection with each other. And we should defeat instead of carrying into execution the will of the law-making power, if we selected one or two of these acts, and founded our judgment upon the language they contained, without comparing and considering them in association with other laws passed upon the same subject.

It would extend this opinion to an unreasonable length, to quote at large the language of the various acts and provisos above mentioned; nor indeed do we deem it necessary, because the object and policy of this whole legislation, when taken together, will [* 468] be made evident by looking to the state * of the law before and at the time the different laws were passed, and the defects which then existed, and which they were intended to remedy. A particular reference to a few of them, in chronological order, will be sufficient for this purpose, and we shall refer to those which have been mainly relied on by the circuit court, or by the counsel for the United States, in order to support the judgment of the court below.

The first law upon this subject is the act of May 7, 1822, section 18, which provides that "no collector, surveyor, or naval officer, shall ever receive more than \$400 annually, exclusive of his compensation as collector, surveyor, or naval officer, and the fines and forfeitures allowed by law for any service he may render in any other office or capacity."

At the time this law passed, the collectors, surveyors, and naval officers, were, in certain contingencies mentioned in the act of March 2, 1799, required to do the duties of the offices of each other; and, without any special law upon the subject, it was the settled practice and usage of the government to require collectors to superintend lights and light-houses in their respective districts, and to disburse money for marine hospitals and the revenue-cutter service; for which, by the practice and regulations of the treasury department, they were allowed certain commissions. But there was no act of congress imposing these duties on the collector, or fixing his commissions for these services and disbursements. They were charged as extra services—that is, as not belonging to the office of collector, and the amount of his compensation depended altogether upon the discretion of the secretary of the treasury for the time being. These extra allowances in some instances amounted to very large sums; and it appears that the attention of congress was at length attracted to this subject, and it was deemed right, and more consistent with the nature and character of our institutions, to fix by law the compensation for these services, and not leave it in every case to depend upon the discretion of the sec-

retary, and the act of 1822 was accordingly passed for that purpose, and for that purpose only. The language is clear, precise, and appropriate, and no multiplication of words could more plainly indicate its *object. The words "any other office" [* 469] were evidently used with reference to the contingencies in which one of these officers might be required to perform the duties imposed by law on one of the others. And the words "or other capacity" were equally essential, in order to embrace the extra allowances made for the agency of which we have spoken, as they were not the duties of an office created by law, but a mere agency of one of the departments of the government. The law does not forbid compensation for extra services which have no affinity or connection with the duties of the office he holds. On the contrary, it recognizes his right, and gives the collector or other of these revenue officers an additional sum, over and above their salaries as officers, for extra services rendered as agents, which had no legal connection with their respective offices.

The duties for which this certain compensation was fixed were well known in the usages and practice of the government, and congress could therefore act advisedly and with knowledge, and judge what amount of money would be a fair compensation. But it will hardly be supposed that congress, by this law, intended to fix this amount for every unforeseen and possible service, or the duties of every possible office which one of these revenue officers should be directed or requested by the secretary in some emergency to fill; for, as congress could not foresee what might be the character and importance of such a duty, there was no basis on which a judgment of its value could be formed. Nor can it be supposed that they intended to regulate in advance its compensation or value without some data to act upon.

Besides, no other salaried officer is mentioned in this law but collectors, surveyors, and naval officers; and it would hardly be just to the legislative body to impute to it the design of dealing more harshly with these revenue officers than any other officers of the government who have certain salaries, or to suppose they would deny to them compensation in cases where every other salaried officer was allowed to claim and receive it.

We have dwelt more particularly on this act of congress, * because the principles and policy on which it was passed [* 470] form the basis of all the subsequent legislation on this subject, and will be found, with some modification, in every law. The great object has been to establish, by law, the compensation for public services, whether in offices or agencies, where the nature

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and character of the duties to be performed were sufficiently known and definite to enable congress to form an estimate of its value, and not leave it to the discretion of the head of an executive department.

After this act of 1822, there is no act of congress bearing upon the question until 1839. In the meantime, about the year 1833, and subsequently to that time, several cases came before the supreme court, in which officers who were not named in the act of 1822, but who received a fixed salary as a clerk in a department, or a fixed compensation as an officer in the army, or in some other office, claimed the right to set off against the United States compensation for extra services undertaken by the direction of the secretary, and for which there was no fixed compensation by law. And in these cases this court held that such compensation might be claimed and set off under the act of congress allowing set-offs against the United States; and that, where the extra service had been required by the head of the proper department, the officer was entitled to a reasonable compensation, to be allowed by the jury upon the evidence, even if there was no law expressly requiring the service or fixing compensation for it; and that it might be ascertained and allowed by the jury in proper cases, under the direction of the court, even if the head of the department had fixed no compensation, and refused to allow the claim.

Under these decisions, claims of this description were frequently made, and the United States involved in inconvenient controversies in court. These controversies again attracted the attention of congress to the subject of compensation for extra services; and in 1839 they passed an act, embracing all persons holding office with a fixed salary, precisely similar in its principles with the act in re-

lation to custom-house officers—that is to say, they took [* 471] away from the heads of departments, * and from courts

and juries, the right to fix the compensation in any case where it was not fixed by law; and if there was no law ascertaining the compensation or allowance for the particular service, the party was entitled to none. It carries out the principle and policy of the act of 1822, and provides that there shall be no compensation in addition to the salary, “unless said extra allowance or compensation be authorized by law.”

Nor does the act of August 23, 1842, (5 Stat. 510,) go further than the act of 1839, except only in declaring that, in order to entitle the party to demand compensation, it must not only be fixed by law, but that the law appropriating it shall explicitly set forth that it is for such additional pay, extra allowance, or compensation. Now, these words, added to the provisions in the act of 1839, only

show that the legislature contemplated duties imposed by superior authority upon the officer as a part of his duty, and which the superior authority had in the emergency a right to impose, and the officer was bound to obey, although they were extra and additional to what had previously been required. But they can by no fair interpretation be held to embrace an employment which has no affinity or connection, either in its character or by law or usage, with the line of its official duty, and where the service to be performed is of a different character and for a different place, and the amount of compensation regulated by law.

This provision is introduced in the annual appropriation law for the support of the army and Military Academy. And although the words are general, and undoubtedly include officers in every branch of the public service, yet, from the general character and objects of this law, it is manifest that the attention of congress must have been mainly directed to officers in the military service, who, from the position in which unforeseen events often place them, are called upon and required to perform duties not specified by law or regulation, but which grow out of, and are associated with, military service.

We pass on to the acts of 1848 and 1849, which are the more important because they were passed about the time this collector came into office, and apply particularly to the revenue *officers of which we are speaking. The clauses which [* 472] bear upon this question in each of these laws is inserted in the annual civil and diplomatic appropriation law, by way of proviso to the clause making appropriations to the maintenance of the light-house service. The act of 1848 appropriates \$11,640.35, being a commission of two and a half per cent. on the whole amount appropriated for that service, with a proviso that no part of the sum thereby appropriated should be paid to any person who received a salary as an officer of the customs; and that from and after the 1st day of July, 1849, the disbursements should be made by the collector of the customs, without compensation. And if this law still remained in force, it is very clear that the agency of which we are speaking would not have been authorized by law, and the set-off claimed by the plaintiff in error could not be allowed.

But this proviso in the act of 1848 is recited at large in the appropriation of 1849, and repealed without any saving or qualification; and this repealing clause is immediately preceded by an appropriation for superintendents' commissions of \$11,673.25, being two and a half per cent. on the whole amount appropriated for light-house purposes. There is no restriction in these commissions

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in relation to revenue officers. The commissions are to be paid on the whole amount, without any reference to the person or officer who performs the service; consequently, under this law the revenue officer who performed this duty within his own district was entitled to two and a half per cent. commission on the amount disbursed; and previous acts of congress restricting this allowance were repugnant to this law, and thereby repealed. The repeal of the act of 1848 could not, upon any sound principle of law, revive any previous act which was repugnant to the provisions contained in the repealing act of 1849. And this act allowed the commission of two and a half per cent. in all cases, and appropriated the money to pay it, leaving to the secretary of the treasury to select as agent each collector for his collection district, or any other agent that he might deem more suitable for the trust.

The act of September 28th, 1850, however, restored the provisions contained in the first act referred to—that is, the [* 473] act of * 1822—and provides that no collector shall receive for his services as superintendent of light-houses over the sum of \$400 per annum. But this act was followed by the civil and diplomatic appropriation law, passed at the same session, September 30th, 1850, only two days after the law above mentioned, in which the compensation is again modified in amount, and collectors whose salary exceeds twenty-five hundred dollars can receive no compensation as superintendent of lights or disbursing agent. Yet this law, like the preceding appropriation laws, appropriates a sum equal to two and a half per cent. commission upon the whole amount appropriated for light-house service, and the secretary might therefore employ any agent he pleased; and if he was not the collector, he would be entitled to full commissions. The same provisions are contained in the appropriation acts of 1851, (9 Stat. 608,) 1852, (10 Stat. 86,) and 1853, (10 Stat. 200.)

It will be seen, from this history of the complicated legislation on this subject, that, however varying the provisions may be in some particulars, they are yet all founded on the principles and policy of the acts of 1822 and 1839, and that all of the provisos respecting the commissions to a revenue officer are confined to his collection district, and its extra customary duties therein as agent.

The just and fair inference from these acts of congress, taken together, is, that no discretion is left to the head of a department to allow an officer who has a fixed compensation any credit beyond his salary, unless the service he has performed is required by existing laws, and the remuneration for them fixed by law. It was undoubtedly within the power of the department to order this

collector and every other collector in the Union, to purchase the articles required for light-house purposes in their respective districts, and to make the necessary disbursements therefor. And for such services he would be entitled to no compensation beyond his salary as collector, if that salary exceeded \$2,500.

But the secretary was not bound to intrust this service to the several collectors. He had a right, if he supposed the public interest required it, to have the whole service performed by a *single agent; for while the law authorizes him to [*474] exact this service from the several collectors, it at the same time evidently authorizes him to commit the whole to an agent or agents other than the collectors, by regulating the commission which an agent shall receive, and appropriating money for payment of commissions of two and a half per cent. upon the whole amount authorized to be expended in this service. And as the collectors would by law be entitled in some cases to nothing, and in others to the small sum above mentioned, if the service was performed by them in their respective districts, it is very clear, from the commissions allowed, and the appropriation to pay them, that he was at liberty to employ a different agency, and pay the commissions given by the law whenever he supposed the public would be better served by this arrangement.

And the case as assumed in the record is precisely that case. The secretary had no right, under the laws upon this subject, to order this or any other collector to perform this duty for all the light-house and collection districts. The law has divided it among them, and the executive department had no right to impose it upon one. But he had a right, as we have said, to employ an agent, instead of the collector or collectors of the several districts; and if he did employ one, the law fixed the compensation, and appropriated the money to pay it. He was not forbidden to employ a revenue officer for this purpose; and, so far as his services were performed for other districts, he stood in the same relation to the government as any other agent. The law forbidding compensation, or reducing it to a small amount, did not apply to this service. The agency was entirely foreign to his official duties, and far beyond the limits of the district to which the law confined his official duties and power. And as the department appointed him to perform a duty required by law, for which the compensation was fixed by law, and the money appropriated to pay it, he is entitled to the compensation given by law, if he has performed the duty; for the secretary has no more discretionary power to withhold what the law gives, than he has to give what the law does not

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[* 475] authorize. The *agency and services performed in this instance had no more connection with his official duties and position than the purchase of a supply of shoes for the troops in Mexico, in the late war, would have been, in the absence of any other person authorized to make such a purchase. And if such a duty was requested or required of him by the head of the proper department, and performed, nobody would deny his right to compensation, if the law authorized and required the service to be done, and fixed the compensation for it.

Upon the case, therefore, as the plaintiff in error offered to prove it, we think the court erred in refusing to admit the testimony.

Undoubtedly, congress have the power to prohibit the secretary from demanding or receiving of a public officer any service in any other office or capacity, and to prohibit the same person from accepting or executing the duties of any agency for the government, of any description, while he is in office, and to deny compensation altogether, if the officer chooses to perform the services; or they may require an officer holding an office with a certain salary, however small, to perform any duty directed by the head of the department, however onerous or hazardous, without additional compensation. But the legislative department of the government have never acted upon such principles, nor is there any law which looks to such a policy, or to such unlimited power in the head of an executive department over its subordinate officers.

No explanation is given of the principle upon which the four hundred dollars additional compensation was allowed. If the services were regarded as extra and additional, and within the prohibition of the law, then he was not entitled to this additional allowance, because his salary exceeded twenty-five hundred dollars, and nothing more than the salary fixed ought to have been allowed him. But if they were not within the prohibition, but for services in a different agency, then he was entitled, not merely to four hundred dollars, but to the commissions fixed by law. This sum could not have been allowed for supplies in his own district, excluding those for other districts, because, as regards his own district, there is an express prohibition *as above stated.

We, however, express no opinion upon that particular item; and whether it is a proper allowance or not, must be determined by the circuit court, when it hears the evidence at the trial.

For the reasons above stated, the judgment of the circuit court must be reversed.

Mr. Justice CATRON, Mr. Justice GRIER, and Mr. Justice CAMPBELL, dissented.

Mr. Justice CAMPBELL dissenting.

I dissent from the opinion and judgment of the court in this case. The opinion of the presiding judge of the circuit court, in my judgment, contains an exact exposition of the law of the case. Justices Catron and Grier authorize me to say they concur in this dissent, and we adopt that opinion as our opinion, which is in the following words:

This is an action for money had and received to the use of the United States, by Philip Greely, jun., the defendant's intestate, while collector of the customs for the port of Boston and Charlestown.

A number of items were in question when the case was opened, but in the progress of the trial all were disposed of to the satisfaction of both parties, save a charge made by the intestate, of \$17,968.92, as commissions on disbursements made by him under the orders of the secretary of the treasury, in the purchase of oil and other materials for light-houses. The question is, whether the collector was entitled, by law, to make this charge against the United States for that service. Mr. Greely held the office of collector from May 1, 1849, to May 1, 1853.

By the act of March 3, 1841, sec. 5, (5 Stat. at L. 432,) it was enacted, that "no collector shall, on any pretense whatever, hereafter receive, hold, or retain for himself, in the aggregate, more than six thousand dollars per year, including all commissions for duties, and all fees for storage, or fees or emoluments, or any other commissions, or salaries, which are now allowed by law."

* The act of August 23, 1842, sec. 2, (5 Stat. at L. 510,) [*477] is as follows: "That no officer in any branch of the public service, or any other person, whose salary, pay, or emoluments, is or are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatsoever, unless the same shall be authorized by law, and the appropriation therefor explicitly set forth, that it is for such additional pay, extra allowance, or compensation."

It being admitted that Mr. Greely was an officer whose salary, pay, or emoluments, was or were fixed by the law, and that he had received its full amount of six thousand dollars, independent of the charge in question, it is incumbent on the defendant to show, not only that the service was authorized by law, but also that the

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appropriation for that service explicitly sets forth that it is for such additional pay, extra allowance, or compensation. It is not enough to find an act of congress authorizing a service, and making an appropriation to pay for it. This would be sufficient, provided the person rendering the service were not an officer, or other person, entitled to a fixed compensation. If he be, and he claims an extra compensation for an extra service, he must produce an appropriation which explicitly sets forth that it is made for such additional compensation; that is, he must show not only that congress contemplated and provided for a service, and payment therefor, but that they contemplated and explicitly provided that if it should be rendered by one already entitled to a fixed compensation, he should nevertheless receive, in addition thereto, the compensation provided for such service. And the addition of such compensation to a fixed compensation is not to be inferred from any equitable considerations, but must be found explicitly declared in the law itself.

Such, in my judgment, is the fair interpretation of the language of this act; and the history of the legislation of congress upon this subject of the extra compensation of officers makes this interpretation, if possible, still more plain and necessary.

The defendant relies on the following clause in the appropriation act of March 3, 1849, (9 Stat. at L. 367:)' "For superintendent's * commissions, at two and one-half per cent. on the \$466,930.08 appropriated above for light-house purposes, \$11,673.25. And the proviso contained in the act making appropriation for the civil and diplomatic expenses of the government, for the year ending the 30th day of June, 1849, and for other purposes, approved, &c., which proviso is in the following words: 'Provided, that no part of the sum hereby appropriated shall be paid to any person who receives a salary as an officer of the customs; and from and after the 1st day of July, 1849, the said disbursement shall be made by the collectors of the customs without compensation, is hereby repealed.' "

The argument of the defendant's counsel is, that the express repeal of this proviso is equivalent to an explicit declaration that parts of the sum appropriated by this act might be paid to persons who received salaries as officers of the customs, and that it was not to be disbursed by collectors without compensation.

But, certainly, this appropriation does not "explicitly set forth that it is for additional pay, extra allowance, or compensation." If this appears at all, it is only inferentially; and the inquiry is, whether it be a necessary inference that some part of this sum was appropriated as additional pay or extra compensation to

collectors who should perform the service of superintendents of lights.

Now, the proviso which was repealed consisted of two parts. The first related exclusively to commissions in the disbursement of the appropriation for light-house expenses made for the fiscal year ending on the 30th day of June, 1849; and it prohibited the payment of any commissions out of the sum thus appropriated, to any officer of the customs who received a salary.

The second part of the proviso positively required the service of making disbursements as superintendents of lights to be performed by collectors of customs, after July 1, 1849, without compensation. It left no discretion with the secretary of the treasury to appoint any other person to discharge this duty.

The repeal of the proviso left the right of officers of [479] the customs to participate in the commissions for disbursing the appropriation made for the year ending June 31, 1849, to stand upon the law as elsewhere found; and restored to the secretary of the treasury the power to appoint persons other than collectors to make the disbursements; and if collectors should be appointed, it left their right to commissions to depend on the law as elsewhere found.

It must be admitted that this repeal might, under some circumstances, indicate an intention to have collectors participate in these commissions. If they have been for the first time deprived of them by the proviso, its repeal would quite clearly show that their former title was restored. But the contrary is true. Independent of the proviso, they had no title to this or any other extra compensation, and, by force of the act of August 2, 1842, could have none, unless explicitly granted by the act making the appropriation; so that unless I can say that the repeal of the proviso either repeals the second section of the act of 1842, or satisfies its requirements by an explicit appropriation to pay an extra compensation for an extra service, the defendant has no title to the commission. That the second section of the act of 1842 is not repealed by implication, by the repeal of the proviso, is clear. There is no repugnance between this repeal and the act of 1842. The reasons for repealing the entire proviso may have been that the act of 1842 was broad enough to cover the cases of extra compensation contemplated by the proviso, and so it was not necessary, in so far as its object was to provide for those cases; and in so far as it required the service to be performed by collectors only, that it was inexpedient. But to amount to a compliance with the second section of the act of 1842, it should have superadded to the repeal of the proviso, an explicit

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declaration that the appropriation was intended as extra compensation to those officers, having fixed salaries, who might be selected to render the service.

There are two other views of this subject, either of which would, in my judgment, be sufficient to show that there is no lawful claim to these commissions.

[* 480] *The first is, that although Mr. Greely was superintendent of lights within a certain district, extending round the Massachusetts Bay, yet these commissions are charged on disbursements made by him in the purchase, under the orders of the secretary of the treasury, of oil and some other materials for the whole light-house service of the United States. Now, the appropriation made is for "superintendents' commissions." If he did not render this service as superintendent, but aside from that employment, acted under the orders of the secretary of the treasury in making large purchases for this service, no appropriation is made for paying him. It was, no doubt, an erroneous and responsible duty, imposed on him because he happened to be at a place favorable for making these purchases; and this may constitute a claim on the equitable consideration of congress, especially if the imposition of this erroneous duty on him, instead of distributing it among all or most of the superintendents of lights, was advantageous to the government. But this is for the consideration of congress. It does not enable me to say an appropriation to pay commissions by way of extra compensation was actually made.

Besides, if the repeal of the proviso in the act of 1848 were held to amount to an explicit declaration that collectors might participate in the commissions of superintendents, by way of extra compensation, the inquiry would still remain, to what extent may they receive such extra compensation? And this seems to me to be answered by the act of May 7, 1822, sec. 18, (3 Stat. at L. 696,) "That no collector, surveyor, or naval officer, shall ever receive more than four hundred dollars annually, exclusive of his compensation as collector, surveyor, or naval officer, and the fines and forfeitures allowed by law, for any services he may perform for the United States in any other office or capacity." In the case of *Hoyt v. United States*, (10 How. 141,) the supreme court considered this section in force, and applied it to the case of a collector who held office from March, 1838, to March, 1841, and I am not aware of its having been since repealed. It was admitted that, aside from the charge now in question, Mr. Greely had received extra compensation to the extent of four hundred dollars annually, for

[* 481] *services performed for the United States in a capacity

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other than that of collector. It follows, that for services performed in making these contracts and disbursements, which were not within his duties as collector, he can make no further charge.

What has thus far been said relates exclusively to the defendant's claims under the act of 1849. The subsequent acts are so much more unfavorable to these claims, that I do not deem it necessary to enter into a particular discussion of them. They are the acts of September 30, 1850, (9 Stat. at L. 533,) March 3, 1851, (9 Stat. at L. 608,) and August 31, 1852, (10 Stat. at L. 86.) I have examined these acts, and am satisfied each of them deprives every collector, whose compensation exceeds twenty-five hundred dollars, of all participation in these commissions, though they are required to render the service of superintendents of lights or disbursing agents in procuring supplies for them.

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21 H. 481.

MISSOURI LAND TITLES—EJECTMENT.

21h 481
L-ed 198
38f 790
38f 791

- 1 In an action of ejectment in the courts of the United States, the plaintiff can only recover on the legal title, notwithstanding any statute of the State which authorizes a recovery on an equitable and inchoate legal title.
- 2 Hence, in a suit on the right conferred by the location of a New Madrid certificate in Missouri, where no patent has issued on said location, the title being in the United States, the action cannot be maintained in the circuit court of the United States.
3. The distinction between the remedies at law and in equity must be preserved in those courts, without regard to State statutes on the subject.

WRIT of error to the circuit court for the district of Missouri.
The case is fully stated in the opinion.

Mr. Gibson and Mr. Gamble, for plaintiff.

Mr. Leonard, for the defendant.

* Mr. Justice DANIEL delivered the opinion of the court. [* 482]

The defendant in error, as a citizen of the State of Illinois, instituted an action of ejectment against the plaintiff in the court above mentioned, and obtained a verdict and judgment against him for a tract of land, described in the declaration as a tract of land situated in St. Louis county, being the same tract of land known as United States survey No. 2,489, and located by virtue of a New Madrid certificate No. 105, and containing six hundred and forty acres.

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Both the plaintiff and defendant in the circuit court trace the origin of their titles to the settlement claim of one James Y. O'Carroll, who, it is stated, obtained permission as early as the 6th of September, 1803, from the Spanish authorities, to settle on the vacant lands in upper Louisiana, and who, in virtue of that permission, and on proof by one Ruddell of actual inhabitancy and cultivation prior to the 20th of December, 1803, claimed the quantity of one thousand arpens of land near the Mississippi, in the district of New Madrid. Upon this application, the land commissioners, on the 13th of March, 1806, made a decision by which they granted to the claimant one thousand arpens of land, situated as aforesaid, provided so much be found vacant there.

On the 14th of December, 1810, the commissioners, acting again on the claim of O'Carroll for one thousand arpens, declare that the board grant to James Y. O'Carroll three hundred and fifty acres of land, and order that the same be surveyed as nearly in a square as may be, so as to include his improvements. The claim thus allowed by the commissioners was, by the operation of the 4th section of the act of congress approved March 3, 1813, enlarged and extended to the quantity of six hundred and forty acres. (*Vide Stat. at Large*, p. 813, vol. 2.)

In the year 1812, a portion of the lands in the county of New Madrid having been injured by earthquakes, congress, by an act approved on the 17th of February, 1815, provided that [*483] * "any person or persons owning lands in the county of New Madrid, in the Missouri territory, with the extent the said county had on the 10th day of November, 1812, and whose lands have been materially injured by earthquakes, shall be and they hereby are authorized to locate the like quantity of land on any of the public lands of the said territory, the sale of which is authorized by law." (*Stat. at L. vol. 3, p. 211.*)

On the 30th of November, 1815, the recorder of land titles for Missouri, upon evidence produced to him that the six hundred and forty acre grant to James Y. O'Carroll had been materially injured by earthquakes, in virtue of the act of congress of 1815, granted to said O'Carroll New Madrid certificate No. 105, by which the grantee was authorized to locate six hundred and forty acres of land on any of the public lands in the territory of Missouri, the sale of which was authorized by law. Upon the conflicting claims asserted under this New Madrid certificate, and upon the ascertainment of the locations attempted in virtue of its authority, this controversy has arisen.

Each party to this controversy professes to deduce title from the

settlement right of O'Carroll, through mesne conveyances proceeding from him. With respect to the construction of these conveyances, several prayers have been presented by both plaintiff and defendant, and opinions as to their effect have been expressed by the circuit court; but as to the rights really conferred, or intended to be conferred, by these transactions, it would, according to the view of this cause taken by this court, be not merely useless, but premature and irregular to discuss, and much more so to undertake to determine them.

This is an attempt to assert at law, and by a legal remedy, a right to real property—an action of ejectment to establish the right of possession in land.

That the plaintiff in ejectment must in all cases prove a *legal* title to the premises in himself, at the time of the demise laid in the declaration, and that evidence of an *equitable* estate will not be sufficient for a recovery, are principles so elementary and so familiar to the profession as to render unnecessary the citation of authority in support of them. Such authority may, * how- [* 484] ever, be seen in the cases of *Goodtitle v. Jones*, 7 T. R.

49; of *Doe v. Wroot*, 5 East. 132; and of *Roe v. Head*, 8. T. R. 118. This legal title the plaintiff must establish either upon a connected documentary chain of evidence, or upon proofs of possession of sufficient duration to warrant the legal conclusion of the existence of such written title.

By the constitution of the United States, and by the acts of congress organizing the federal courts, and defining and in vesting the jurisdiction of these tribunals, the distinction between common law and equity jurisdiction has been explicitly declared and carefully defined and established. Thus, in section 2, article 3, of the constitution, it is declared that "the judicial power of the United States shall extend to all cases in *law* and *equity* arising under this constitution, the laws of the United States," &c.

In the act of congress "to establish the judicial courts of the United States," this distribution of law and equity powers is frequently referred to; and by the 16th section of that act, as if to place the distinction between those powers beyond misapprehension, it is provided "that suits in equity shall not be maintained in either of the courts of the United States in any case where plain, adequate, and complete remedy may be had at law," at the same time affirming and separating the two classes or sources of judicial authority. In every instance in which this court has expounded the phrases, proceedings at the common law and proceedings in equity, with reference to the exercise of the judicial powers of the

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courts of the United States, they will be found to have interpreted the former as signifying the application of the definitions and principles and rules of the common law to rights and obligations essentially legal; and the latter, as meaning the administration with reference to equitable as contradistinguished from legal rights, of the equity law as defined and enforced by the court of chancery in England.

In the case of *Robinson v. Campbell*, 3 Wheat. on page 221, this court have said: "By the laws of the United States, the circuit courts have cognizance of all suits of a civil nature at common law and in equity, in cases which fall within the [* 485] limits * prescribed by those laws. By the 24th section of the judiciary act of 1789 it is provided, that the laws of the several States; except where the constitution, treaties, or statutes of the United States, shall otherwise provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply. The act of May, 1792, confirms the modes of proceeding then used at common law in the courts of the United States, and declares that the modes of proceeding in suits in equity shall be according to the principles, rules, and usages, which belong to courts of equity, as contradistinguished from courts of common law, except so far as may have been provided for by the act to establish the judicial courts of the United States. It is material to consider whether it was the intention of congress by these provisions to confine the courts of the United States, in their mode of administering relief, to the same remedies, and those only, with all their incidents, which existed in the courts of the respective States; in other words, whether it was their intention to give the party relief *at law*, where the practice of the State courts would give it, and *relief in equity only* when, according to such practice, a plain, adequate, and complete remedy could not be had at law? In some States in the Union, no court of chancery exists to administer equitable relief. In some of those States, courts of law recognize and enforce in suits at law all equitable rights and claims which a court of equity would recognize and enforce; in others, all relief is denied, and such equitable claims and rights are to be considered as mere nullities at law. A construction, therefore, that would adopt the State practice in all its extent, would at once extinguish in such States the exercise of equitable jurisdiction. The acts of congress have distinguished between remedies at common law and equity, yet this construction would confound them. The court therefore think, that to effectuate the purposes of the legislature, the remedies in the courts of the

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United States are to be at common law or in equity—not according to the practice in the State courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles.”

* In the case of *Parsons v. Bedford et al.*, 3 Peters, on [*486] pp. 446, 447, this court, in speaking of the seventh amendment of the constitution, and of the state of public sentiment which demanded and produced that amendment, say:

“The constitution had declared, in the 3d article, that the judicial power shall extend to all cases *in law and equity* arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority, &c. It is well known that in civil suits, in courts of equity and admiralty, juries do not intervene, and that courts of equity use the trial by jury only in extraordinary cases. When, therefore, we find that the amendment requires that the right of trial by jury shall be preserved in suits at common law, the natural conclusion is, that the distinction was present in the minds of the framers of the amendment. By *common law*, they meant what the constitution denominated in the 3d article *LAW*, not merely *suits* which the common law recognized among its old and settled proceedings, but suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where *equitable rights* alone were recognized and equitable remedies administered.”

The same doctrine is recognized in the case of *Strother v. Lucas*, in 6 Peters, pp. 768, 769, of the volume, and in the case of *Parish v. Ellis*, 16 Peters, pp. 453, 454. So, too, as late as the year 1850, in the case of *Bennett v. Butterworth*, reported in the 11th of Howard, 669, the chief justice thus states the law as applicable to the question before us:

“The common law has been adopted in Texas, but the forms and rules of pleading in common-law cases have been abolished, and the parties are at liberty to set out their respective claims and defenses in any form that will bring them before the court; and, as there is no distinction in its courts between cases at law and in equity, it has been insisted in this case, on behalf of the defendant in error, that this court may regard the plaintiff’s petition either as a declaration at law or a bill in equity. Whatever may be the laws of Texas in this respect, they do not govern the proceedings in the courts of the United States; and, although the forms of proceedings *and practice in the State courts [*487] have been adopted in the district court, yet the adoption of the State practice must not be understood as confounding the

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principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit. The constitution of the United States, in creating and defining the judicial power of the general government, establishes this distinction between law and equity, and a party who claims a legal title must proceed at law, and may undoubtedly proceed according to the forms of practice in such cases in the State court. But if the claim be an equitable one, he must proceed according to the rules which this court has prescribed, regulating proceedings in equity in the courts of the United States."

The authorities above cited are deemed decisive against the right of the plaintiff in the court below to a recovery upon the facts disclosed in this record, which show that the action in that court was instituted upon an equitable and not upon a legal title. With the attempt to locate O'Carroll's New Madrid warrant No. 150, in addition to its interference with what was called the *St. Louis common*, there were opposed five conflicting surveys. In consequence of this state of facts, the commissioner of the general land office, on the 19th of March, 1847, addressed to the surveyor general of Missouri the following instructions: "If, on examination, it should satisfactorily appear to you that the lands embraced by said surveys were at the date of O'Carroll's location reserved for said claims, the O'Carroll location must yield to them, because such land is interdicted under the New Madrid act of the 17th of February, 1815; but if, at the time of location, either of the tracts was not reserved, but was such land as was authorized by the New Madrid act to be located, the New Madrid claim No. 105 will of course hold valid against either tract in this category. The fact on this point can be best determined by the surveyor general from the records of his office, aided by those of the recorder. If there be no valid claim to any portion of the *residue* of the O'Carroll claim, and such residue was such land as was allowed by the New Madrid act of 17th of February, 1815, to be located, on the re-
[* 488] turn here of a proper *plat and patent certificate for said residue, a patent will issue."

At this point the entire action of the land department of the government terminated. No act is shown by which the extent of the *St. Louis common*, said to be paramount, was ascertained; no information supplied with respect to the validity or extent of the conflicting surveys, as called for by the commissioner; no plat or patent certificate, either for the whole of the warrant or for any residue to be claimed thereupon, ever returned to the General Land Office, and no patent issued. The plaintiff in the circuit court

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founded his claim exclusively and solely upon the New Madrid warrant.

The inquiry then presents itself, as to who holds the *legal* title to the land in question. The answer to this question is, that the title remains in the original owner, the government, until it is invested by the government in its grantee. This results from the nature of the case, and is the rule affirmed by this court in the case of *Bagnall et al. v. Broderick*, in which it is declared, "that congress has the sole power to declare the dignity and effect of titles emanating from the United States; and the whole legislation of the government in reference to the public lands declares the patent to be the superior and conclusive evidence of the *legal title*. Until it issues, the fee is in the government, which by the patent passes to the grantee, and he is entitled to enforce the possession in ejectment. (13 Peters, p. 436.)

A practice has prevailed in some of the States (and amongst them the State of Missouri) of permitting the action of ejectment to be maintained upon warrants for land, and upon other titles not complete or legal in their character; but this practice, as was so explicitly ruled in the case of *Bennett v. Butterworth*, (11 How.,) can in no wise affect the jurisdiction of the courts of the United States, who, both by the constitution and by the acts of congress, are required to observe the distinction between legal and equitable rights, and to enforce the rules and principles of decision appropriate to each.

The judgment of the circuit court is to be reversed with costs.

HIRAM CLEARWATER, Plaintiff in Error, v. SOLOMON MEREDITH and others.

21 H. 489.

JURISDICTION OF THE CIRCUIT COURTS—CITIZENSHIP.

1. By the act of February 28, 1839, (5 U. S. Statutes, 321,) a suit can be maintained in the circuit court of the United States against one or more joint obligors, where others bound in the same instrument are not sued, when, by the judgment in said suit, the rights of the absent co-obligors would not be affected or injured.
2. In such case the jurisdiction would not be defeated by the fact that the obligors not sued were citizens of the same State with plaintiff.
3. The case of *Hill v. Smith*, 21 How. 284; 2 Miller, 788, reaffirmed, and its principles applied to this case.

WRIT of error to the circuit court for the district of Indiana.

The facts are stated in the opinion of the court.

Clearwater v. Meredith.

Mr. Pugh, for plaintiff in error.

Mr. Thompson, for defendants.

[* 490] * *Mr. Justice McLEAN* delivered the opinion of the court.

This is a writ of error to the circuit court of the United States for the district of Indiana.

The plaintiff, who is averred to be a citizen of the State of Ohio, brought his action against Solomon Meredith and Thomas Tyner, citizens of Indiana, on the 12th July, 1853, together with Caleb B. Smith, who, at time of the commencement of this suit, was not a citizen of the State of Indiana, and is therefore not joined as a defendant herein, &c.

[* 491] * The declaration has three counts, one of which contains the following guaranty:

“Whereas Hiram Clearwater, of the city of Cincinnati, on the 6th of May, 1853, contracted with the Cincinnati, Cambridge, and Chicago Short Line Railway Company for the sale of a tract of land situate in Wayne county, Indiana, lying on the national road, about four miles east of Cambridge city, and adjoining the lands of John Jacobs and others, containing three hundred and twenty acres, for the consideration of ten thousand dollars, to be paid in the capital stock of said company at par; and whereas, in such contract of sale, it was agreed that said company should furnish to said Clearwater a guaranty that the capital stock of said railway company should be at par within one year from the completion of the entire line of said road. Now, in consideration that the said H. Clearwater has, with the consent of the said company, and at our request, executed a deed of conveyance to Solomon Meredith for said land, to whom the same has been sold by the said company, we, the undersigned, hereby guaranty that the said stock of said company, which has been issued to said Clearwater in pursuance of said contract, shall be worth par in the city of Cincinnati within one year from the time the said railroad shall be completed from Cincinnati to Newcastle, Indiana, and that said road shall be completed within two years from the 1st day of October, 1853, and signed by Pleasant Johnson, S. Meredith, Caleb B. Smith, and Thomas Tyner.”

The defendants, by counsel, come and say the declaration of the said plaintiff, and the counts therein contained, are severally insufficient in law to enable said plaintiff to have and maintain his action against said defendants; and for cause of demurrer shows to the court the following:

1. The jurisdiction of the court is not shown by proper averment.

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2. No consideration is shown for the undertaking.

3. The several counts do not contain facts sufficient to constitute a cause of action; wherefore the defendants pray judgment, &c.

If this be regarded as a plea to the jurisdiction of the court, *it is argued that the suit is brought on a joint [*492] contract executed by the defendants in error, when only two of them were served with process, and the third one, Caleb B. Smith, who, at the time of the commencement of the suit, was not a citizen of the State of Indiana, and is therefore not joined as a defendant herein, &c.

The first section of the act of February 28th, 1839, provides that "where, in any suit at law or in equity commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of or found within the district where the suit is brought, or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction, and proceed to the trial and adjudication of such suit between the parties who may be properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process, or not voluntarily appearing to answer."

In the case of the Railroad Bank of Vicksburg v. Slocomb *et al.*, (14 Peters, 65,) it is said the 11th section of the judiciary act declares that no civil suit shall be brought, before either of said courts, against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ.

It has been held that this is a personal privilege of not being sued out of the district in which the defendant may live, or in which he shall be found on serving the writ, and that it may be waived by the defendant. And it is said, in the above opinion, "that it did not contemplate a change in the jurisdiction of the courts, as it regards the character of the parties, as prescribed by the judiciary act, and expounded by this court—that is, that each of the plaintiffs must be capable of suing, and each of the defendants capable of being sued; which is not the case in this suit, some of the defendants being citizens of the same State with the plaintiffs."

It is well known that the act of 1839 was intended so to modify the jurisdiction of the circuit court as to make it more practical and effective. Where one or more of the defendants *sued were citizens of the State, and were jointly bound [*493] with those who were citizens of other States, and who did not voluntarily appear, the plaintiff had a right to prosecute his

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suit to judgment against those who were served with process; but such judgment or decree shall not prejudice other parties not served with process, or who do not voluntarily appear.

Now, it is too clear for controversy, that the act of 1839 did intend to change the character of the parties to the suit. The plaintiff may sue in the circuit court any part of the defendants, although others may be jointly bound by the contract who are citizens of other States. The defendants who are citizens of other States are not prejudiced by this procedure, but those on whom process has been served, and who are made amenable to the jurisdiction of the court.

And in regard to those whose rights are in no respect affected by the judgment or decree, it can be of no importance of what States they are citizens. If one of the defendants should be a citizen of the same State with the plaintiff, no jurisdiction could be exercised as between them, and no prejudice to the rights of either could be done.

The plea to the jurisdiction seems not to be well taken, and it cannot be sustained.

In the case of *Hill v. Smith* and others, decided at the present term, this court held that the demurrer filed to the counts on the guaranty did not bring up the validity of that instrument for the action of the court, and that it must be specially pleaded with suitable averments. And the court reversed the judgment, and remanded it to the circuit court, with leave, on the payment of costs, to move to amend the pleadings, so as to raise the questions on the guaranty. The same order is made in the present case.

Judgment reversed.

**WILLIAM P. LEA, Appellant, v. THE POLK COUNTY COPPER COMPANY
and others.**

21 H. 493.

**MISTAKE IN PATENT FOR LANDS—EQUITY WILL NOT GIVE RELIEF AGAINST INNOCENT
PURCHASER—STATUTE OF LIMITATION.**

William Pinkney Lea and William Park Lea both located land in Tennessee, and both used the name of William P. Lea. The register of the land office, to prevent mistake, inserted in a patent the name of William *Park* Lea. The bill in this case, filed many years after, alleges this to be a mistake, and seeks equitable relief. Held, 1. That subsequent purchasers from William Park Lea without notice of the mistake will be protected in equity. 2. That actual possession by such a purchaser is notice of his title, though his deed was not recorded for some time afterwards. 3. That such actual possession as is shown in this case by the evidence, (for seven years,) under the statute of Tennessee, is a bar to the relief sought.

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THIS was an appeal from the circuit court for the eastern district of Tennessee. The facts of the case are fully stated in the opinion.

Mr. Campbell and *Mr. Stanton*, for appellant.

Mr. Smith, *Mr. Lyon*, and *Mr. Maynard*, appellees.

* Mr. Justice CATRON delivered the opinion of the court. [* 495]

There stood on the record book an entry for 80 acres, in the name of William P. Lea, No. 5,446, dated April 5, 1842.

A patent issued, founded on this entry, dated 21st August, 1842, No. 5,744.

This patent is in the name of William Park Lea. It was signed by the governor, countersigned by the secretary of state, and sealed with the great seal of the State.

As originally filled up, it was in the name of William P. Lea, and was altered to William Park Lea, by adding the letters "ark" to the P. This was done by the register of the land office, whose duty it was to prepare the patent for the signatures of the governor and secretary; and the act of affixing the great seal to it, which gave it validity as against the State, divested her title, and vested it in the grantee, on the patent thus executed being delivered to him.

William Park Lea and William Pinkney Lea wrote their names alike, William P. Lea; the latter always, and the former frequently, although he often signed his name William Park Lea. The register added the letters "ark" to the middle name, to distinguish between them, as both had entered lands in the entry taker's office, and confusion prevailed as to who was the proper owner. This is the effect of the register's evidence. In filling up grants Nos. 6,260, 6,258, and 5,764, they were made out in the name of William Park Lea; but the register scraped out the letters "ark," and issued the patents in the name of William P. Lea, because the lands had been entered by William Pinkney Lea.

No. 5,764 of these patents was filled up on the same day (21st August, 1842) that the one (No. 5,744) here in dispute was filled up, and the letters "ark" added to the letter P; the other two (Nos. 6,260 and 6,258) were filled up December 8th, 1842. Five other patents were filled up properly in the name of William P. Lea. This was all done in the latter six months of 1842, and the grants were founded on entries made * in April [* 496] of that year, in the Ocoee land office. The respective claimants were related to each other, and familiarly known to the register. The entries had all been made and were recorded in the name, "William P. Lea."

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That this was honestly done by the register, is not open to dispute. He has given a deposition in great detail, and accounts for his course of proceeding entirely to our satisfaction, so far as his integrity is concerned.

This patent (No. 5,744) the bill seeks to have reformed so as to stand in the name of William P. Lea, the complainant, and to be used in an action of ejectment pending in the court below, by the complainant, against the respondents; and, secondly, if said grant shall be found to have been issued to the person not entitled to the land, that then the court will divest the title of the respondents, and vest it in the complainant, so that he may use the decree on the trial of his action of ejectment.

1. The bill also prays, that the court may remove impending clouds from the complainant's title by declaring all the alleged titles of the respondents, or either of them, void, and direct the possession of said lands to be surrendered to the complainant, together with a prayer for further and general relief.

To the relief sought, among other defenses, (set up in their answers,) the respondents rely on the fact that they claim under one John Davis, who purchased from William Park Lea, and took title by a deed in fee with a general warranty of title for the land in dispute, and that Davis, their vendor, purchased and paid for the land to said William Park Lea, without any notice or knowledge that the complainant had any equity in the land, or set up claim thereto.

This deed is produced, dated June 18th, 1846, and appears to have been duly executed by William Park Lea, and the consideration money was paid to him by John Davis. It is not pretended that John Davis had any notice of the complainant's claim when the deed was executed; the complainant had then no knowledge himself that he had any interest in the land.

One objection to this deed is, that it was not duly proved, and could not be lawfully registered according to the laws of [* 497] * Tennessee. In the certificate of probate of Elias Davis, one of the subscribing witnesses, the clerk does not say the witness swore that the grantor acknowledged the same on the day it bears date. The other witness so proves. Now, as the deed shows the date, and the certificate of probate says the grantor acknowledged it for the purposes therein contained, the probate is covered by the provisions of the act of 1846, (ch. 78, Nicholson's Statute Laws, 242.)

Caldwell, Keith & Mastin, purchased from John Davis in the year 1852, paid the purchase money, (\$6,000,) and took a deed in

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fee simple, with a covenant of general warranty of title for the land in dispute; and they also rely on the plea that they were *bona fide* purchasers of the legal title, or what purported to be so; and this allegation is established by the proof, unless it be true that the letters "*ark*," crowded after the letter P, in William Park Lea's name, at the various places that this alteration is found in the patent, was sufficient to put the purchasers on inquiry. Now, if they had inquired of the register, he could only have told them that he put the letters there in the course of his official duty; but when, he could not say, this being what he proves here. Then the presumption comes in, that, as a public officer, the register did his duty, and he who impeaches the act as illegal must prove the allegation. On this assumption, the register filled up the patent as it is now found, before the governor signed it, and the seal of State was attached—that is to say, when the patent bears date.

Then, again, all the incipient steps authorizing the register to issue the grant, the governor to sign it, and the secretary to attach the great seal, are presumed as having been regular; nor was the purchaser required to look behind the patent. (*Bagnell v. Broderick*, 13 Peters, 448.)

The bill of necessity admits that the *legal* title was vested in William Park Lea by the grant as it now stands; as, on any other assumption, the complainant would have his remedy at law, and must be turned out of court. The title has thus stood since 1842; important rights have grown up under it, with which a court of equity cannot interfere, on general principles of justice.

(1 Story's Com. on Equity, sec. 64, c. 64, *d.*) * We mean [* 498] to say, that if the equity conferred by the entry was in

William Pinkney Lea, and the patent issued in the name of William Park Lea, and the Mining Company, or those under whom they claim, have innocently and ignorantly purchased and paid for the property, and took legal conveyances for it, with an honest belief that they were dealing for and acquiring a legal title from the true owner, then the complainant cannot be heard to set up his equity behind the grant to overthrow the purchase. (1 Story's Eq. 454.) And so the respondents, the Mining Company, might buy in the legal title of William Park Lea *after* they had notice, if they were innocent purchasers, holding under John Davis, and Caldwell, Keith & Mastin. (1 Story Eq. s. 411.)

But it is insisted that the deed from Lea to Davis was not registered, and fraudulently concealed from the complainant, so that he could not proceed to assert his rights. Davis had possession of the

land when he took William Park Lea's deed, claiming for himself, and adversely to all others; and he so continued in possession till he sold the land in December, 1852. This adverse possession was in itself notice that he held the land under a title, the character of which the complainant was bound to ascertain. (*Landis v. Brant*, 10 How. 375.)

Furthermore, Caldwell, Keith & Mastin, purchased from Davis in December, 1852; they caused the deed from William Park Lea to Davis, and the one from the latter to them, to be duly registered, without having any knowledge of the complainant's claim, and without the existence of any circumstance to put them on inquiry respecting it. They were clearly *bona fide* purchasers of a legal title, that the complainant cannot assail in equity.

2. The respondents rely on the act of limitations of the State of Tennessee as a protection to their title and possession. The act declares "that where any person shall have had seven years' possession of any lands which have been granted by this State, holding or claiming the same by virtue of a deed of conveyance or other assurance, purporting to convey an estate in fee simple, [* 499] and no claim by suit in law or equity, effectually prosecuted, shall have been set up or made to said lands within the aforesaid time, then, and in that case, the person or persons, their heirs or assigns, so holding possession, shall be entitled to keep and hold possession of such quantity of land as shall be specified and described in his deed, &c., in preference to, and against all, and all manner of person or persons whatever."

By the settled construction of the foregoing act, an unregistered deed is a sufficient title on which the bar can be founded; and when John Davis's deed from William Park Lea was recorded, it related to its date, and was good to draw the better title to it by force of the statute.

The possessions of John Davis, and Caldwell, Keith & Mastin, made one possession; and if the two were continuous for the whole term of seven years, then the bar was formed, and the defense complete. This brings us to the *fact* of actual possession held by Davis, for after he sold to Caldwell, Keith & Mastin, no one disputes their actual possession.

Davis purchased the improvements on the land from Wallace, 25th February, 1842, for the sum of forty dollars; and by the agreement, Wallace was to hold under Davis and occupy the premises for three years, which Wallace proves he did. He then left the place, and Wilson Abercrombie went into possession under Davis, and occupied the cabin one year. It being in the midst of

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a small field which was annually cultivated in grain crops, Davis removed the cabin beyond the field, and put it up again on the forty-acre lot, and Abercrombie occupied it another year. He was succeeded by Bailey McCoy as tenant of the cabin under Davis; McCoy occupied it for a year or more. Wallace's field could not have included more than some three acres, and had an orchard of peach trees on it. After the cabin was removed, Davis enlarged the field, and extended it across the southern line of the forty-acre lot, and also enlarged it, from time to time, by small clearings at the other end, (which were made for turnip patches,) until the field included about twelve acres, and which was annually cultivated by Davis, whose residence was within a few hundred yards of the field, on the adjoining section of land. This field

was obviously an important part of his plantation. That [500] portion of the twelve-acre field lying on the forty-acre lot embraced, when this suit was brought, about five acres. Mann, the county surveyor, who run the lines of the forty-acre lot, in September, 1855, so states. He proves that the debris and ground plan of the cabin Wallace built and occupied were quite apparent; that the peach trees were there, and that the old and worn land was plainly distinguishable from that more recently cleared up, and which was on its different sides.

To overcome the evidence of continued possession on the part of Davis, two witnesses were produced by the complainant, to wit: Crawford Braswell and Jesse Shubird. The former swears that he resided in Ducktown from June, 1845, to October, 1850; that he knew John Davis, and the place Wallace improved. "I at one time (says he) purposed purchasing that eighty acres where the Wallace improvement was. Davis told me that he had only the occupant of Luther Wallace; that he did not own the land, and that he had moved the improvements off to another place; and, having asked him who owned the land, he stated it was entered by a man by the name of Lea. He stated he had moved off the house and fruit trees, and I think he also named the time." Says he thinks the conversation took place in July, 1848.

In answer to another question, the witness says: "Mr. Davis showed me where he had moved the house from, and I understood he had moved all the improvements off that place, and the stock was running on the land that had been enclosed, and, if any of the fencing was left, I did not notice it. The place was grown up very much with bushes. There might have been some rotten rails scattered where the fence was put, lying among the bushes and saplings."

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This is represented, also, as having taken place in July, 1848; and the witness swears that, in the succeeding August, Davis showed him where the Wallace house had stood. He was interrogated, on the part of the complainant, as follows:

Please state whether or not you afterwards heard John Davis set up claim to the Wallace eighty-acre tract; and if so, state when it was, and fully what he said to you on the subject.

[* 501] * *Answer.* In the winter of 1849, there was a man there from Bradley county, looking at Davis's land, and talking of buying him out. I happened at Davis's at the time, and he requested me not to mention the conversation to any person, that had passed between us, about the land; that if he sold his land to that man, he should sell the Wallace place also.

Question by same. Please state whether that was the first time you heard him assume to own the eighty-acre Wallace tract.

Answer. He did not profess to own it then, but said he should sell it with the balance, if he sold at all.

Interrogatory by same. State whether or not John Davis had the Luther Wallace place enclosed at any time; and if so, state when he had it done.

Answer. If he had it enclosed at any time, it was since I left that country.

To the cross-interrogatories, the witness stated:

Do you say there was no land on the Wallace tract enclosed and in cultivation during the years 1848, 1849, and 1850?

Answer. None in 1848, and none afterwards that I know of.

Are you acquainted with the boundaries of the Wallace land, and can you say, positively, that there was no land on said tract in cultivation during the aforesaid years?

Answer. I was not acquainted with the lines of the tract, and, if there was any in cultivation on the tract, I did not know it.

Can you, then, say positively that no part of the field, about where the old Wallace house stood, was in cultivation during the time mentioned?

Answer. No part of it was in cultivation during the time I lived there.

In your answer to complainant's sixth question, you say he (John Davis) stated that Lea had entered the land. State where that conversation took place, when; and if any person was present, give the name or names.

Answer. This conversation took place at Davis's mill, in the month of July, 1848, and there was no person present.

In your answer to complainant's third question, you say that

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John Davis told you he had only the occupant right, which he * had purchased from Wallace, and that he did [* 502] not own the land; state exactly what he told you, and at what time.

Answer. In the month of July, 1848, he made the statements I have made in that answer, that he had only bought the improvements from Wallace, and that he did not own the land, and would not sell it, and make a title to it.

Shubird swears that he went to Ducktown to reside in 1848, and lived there about three years; says he knew John Davis, and the Luther Wallace improvement.

The succeeding questions propounded for the complainant, and the answers to them, will best present the material statement of this witness:

State whether or not the Luther Wallace improvement was moved from the place where he first put it up; and if so, state who had it moved, and where it was moved to.

Answer. The houses, fencing, and peach trees, were moved from the place they were first put on the Luther Wallace place. They were moved by John Davis, and put on his own land.

How far were these improvements taken from where Luther Wallace had put them up?

Answer. I can't exactly say, but suppose a half mile or three-quarters.

Please state why John Davis removed these improvements. Tell all you may have heard John Davis say on that subject.

Answer. He (John Davis) stated to me that the reason he moved them was, that he was afraid he would lose his labor, as he had understood a man by the name of Lea had entered the land, and stated that he did not own the land.

State whether or not you ever heard John Davis claim the land where the Luther Wallace improvement was, at any time while you lived with him.

Answer. The Luther Wallace place is now called Copper Hill. I think in about the year 1849, after the copper property came into notice, John Davis set up a claim, and said it.

Do you know whether or not the Luther Wallace improvement or property was left vacant and turned out at the time Davis removed the fencing, &c., away? And if so, state how long it was left vacant.

**Answer.* The property was left vacant—how long I [* 503] can't say, but until Davis set up his claim; he then commenced fixing up the fencing again.

On cross-examination, the witness states that he went to Ducktown in March, 1848; that the Wallace house had been removed before; nor was there any enclosed land on the Copper Hill tract when he went there.

He is then further interrogated, and answers:

How can you say, then, as in your answer to complainant's third interrogatory, that the house, fencing, and peach trees, were removed by John Davis, and put upon his own land?

Answer. I heard John Davis say so.

At what time did Davis tell you this, and how did he happen to speak to you on this subject?

Answer. Shortly after I went there—I can't say exactly what time—John Davis and myself, after passing through his farm, passed upon the vacant place of Luther Wallace. He mentioned the subject himself, and told what I have heretofore stated.

On which side of Davis's mill creek was the improvement of which you have been speaking situated?

Answer. It was situated on the left hand when going up the creek.

Was there not, at that time, a small field enclosed between the mill creek and the Copper Hill?

Answer. Not to my knowledge, as I don't know whether there was or not, as I know nothing about it, only as Davis told me that he had taken all off.

Was there any person present when this conversation occurred between you and Davis? If so, state who it was.

Answer. There was no person present.

If the evidence of these two witnesses be true, then there was no continuous adverse holding; and the question is, whether it is entitled to credit? Braswell swears that the entire improvements were removed, including the fruit trees; and that the land where the Wallace improvement had been made was grown up and overrun with bushes and saplings; that this was the condition of the place in 1848. Shubird proves the same, with the exception that he says nothing as respects the undergrowth.

[* 504] So far as conversations with John Davis are given, they may be dismissed, with the remark, that he had obtained William Park Lea's deed for the land in June, 1846, and was not at all likely to carefully disavow all title, and say the land belonged to one Lea.

In 1856, when these depositions were taken, John Davis was dead, and courts of justice lend a very unwilling ear to statements of what dead men had said.

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Many witnesses have been examined to prove that Braswell and Shubird are not entitled to credit on oath as witnesses, and many prove the reverse. That they are men of no substantial worth, and of little respectability, is manifest enough, and confidence in their integrity is certainly impaired. But in this case, as in most others, the integrity of the witnesses is easily ascertained. If the land was grown up in bushes and saplings in 1848, it must have been thrown out as a waste place six or eight years before that time. Davis purchased Wallace's possession in February, 1842. Wallace remained there three years by agreement with Davis. Then Abercrombie came in, and occupied the house one year whilst it stood in the field. It was then removed beyond the field, and had no connection with it. Davis himself took possession of the cleared land, and cultivated it. It was rented by Davis to Dugger, either in 1849 or 1850, and he raised a crop on it. The orchard was there then, and continued there till 1855, after this suit was brought, as Mann, the county surveyor, proves, who traced the lines of the Copper Hill tract, and examined the cleared land in the twelve-acre field, and especially that part north of the southern line of the forty-acre lot. Mann states that the marks of the old house built by Wallace were plainly visible, and so was the old worn land cleared by Wallace, and that the peach trees were there. Substantially the same facts are proved by nearly all of the witnesses examined on part of the respondents. It is the most familiar fact in the cause.

That the Wallace field and orchard were constantly under fence from the time Davis purchased of Wallace, and certainly never abandoned nor overrun with brushwood and saplings, is fully established.

* And our opinion is, that when Braswell and Shubird [* 505] deposed to the reverse, they stated what was untrue.

The complainant in his amended bill does not controvert the fact that adverse possession, for more than seven years, had been holden of the land in dispute, but relies on the following allegations to avoid the bar, to wit:

Your orator shows the defendants, in their answers on file, charge that the said John Davis and those claiming under him had seven years' peaceable, uninterrupted, adverse possession of the land in dispute, previously to the filing of the original bill, and previous to the suit at law; as to which facts no answer is asked herein from defendants; but if any such possession existed, your orator charges, and which charge your orator does require to be answered, that it was a fraudulent possession under a fraudulent grant and

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fraudulent deed, the registration of which was postponed until within about the last two years; that the possession of your orator's grant, first by the said William Park Lea, and then by the said John Davis, was fraudulently concealed from him by them; that he never had any knowledge or information thereof until about the time stated in his original bill, and within the last twelve months; and that, as his cause of action was thus fraudulently concealed, the statute of limitations cannot apply.

These allegations are specially denied by the answer of the respondents, except as to the fact that the deed from William Park Lea to John Davis was not registered, which is admitted. Of the other allegations there is no proof, and of course they are not in the case.

Whether Lea had title or not at the time he conveyed to Davis is altogether immaterial, as the Tennessee act of limitation intended to protect and confirm void deeds purporting to convey an estate in fee simple, where seven years' adverse possession had been held under them. Nor was Davis bound to register his deed from Lea; between them, as grantor and grantee, it was valid without registration. Neither can the complainant be heard to say that he had no notice of the fact that Davis claimed title to the land. His possession and adverse holding was notice to the world, as will be seen by the case of *Landis v. Brant*, above cited.

[* 506] * On the two grounds above stated, we order that the decree of the circuit court dismissing the bill be affirmed.

Mr. Justice DANIEL dissenting:

In the case of *Lea v. The Coppermine Company*, it is my opinion that the company, as a corporation, could neither plead nor be impleaded in a court of the United States.

STEPHEN V. R. ABLEMAN, Plaintiff in Error, v. SHERMAN M. BOOTH;
and THE UNITED STATES, Plaintiff in Error, v. SHERMAN M.
BOOTH.

CONSTITUTIONAL LAW—CONFLICT BETWEEN STATE AND FEDERAL COURTS—HABEAS
CORPUS.

21 H. 506.

1. The act of congress of September 18, 1850, usually called the fugitive slave law, is constitutional and valid.
2. The exclusive jurisdiction for offenses against that law in the State of Wisconsin is vested in the district court of the United States for that district, and from its judgment no appeal or writ of error lies to any other court, State or federal.

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3. The commissioner of the United States has authority to examine and commit, for the action of the district court and its grand jury, a prisoner charged with an offense against that act; and no State court has any jurisdiction or authority to release a prisoner so committed.
4. State courts have no power to review or reverse the judgment of the courts of the United States; and an attempt to do this, by virtue of a writ of *habeas corpus*, is without jurisdiction, and a violation of the law and constitution of the United States.
5. From any such judgment or order of the supreme court of the State a writ of error lies to this court under the 25th section of the judiciary act.
6. When a State court is informed that a person is unlawfully imprisoned, it is its duty, by reason of its general power to release persons so situated, to issue the writ; and when it is made known to the court that the person is held by virtue of an order of a court of the United States, the writ should be discharged.
7. So, when the officer who holds the prisoner under such authority is served with the writ, he should make return of the cause of the commitment and his authority for holding him, but should not deliver the prisoner to the court or part with his custody.

THESE are two cases brought by writ of error to the supreme court of Wisconsin. The facts are fully stated in the opinion.

Mr. Black, attorney general, appeared for plaintiff.

Mr. Booth furnished pamphlet and arguments, and the opinions of the supreme court of Wisconsin were also produced.

* Mr. Chief Justice TANEY delivered the opinion of the [* 507] court.

The plaintiff in error in the first of these cases is the marshal of the United States for the district of Wisconsin, and the two cases have arisen out of the same transaction, and depend, to some extent, upon the same principles. On that account, they have been argued and considered together; and the following are the facts as they appear in the transcripts before us:

Sherman M. Booth was charged before Winfield Smith, a commissioner duly appointed by the district court of the United States for the district of Wisconsin, with having, on the 11th day of March, 1854, aided and abetted, at Milwaukee, in the said district, the escape of a fugitive slave from the deputy marshal, who had him in custody under a warrant issued by the district judge of the United States for that district, under the act of congress of September 18, 1850.

Upon the examination before the commissioner, he was satisfied that an offense had been committed as charged, and that there was probable cause to believe that Booth had been guilty of it; and thereupon held him to bail to appear and answer before the district court of the United States for the district of Wisconsin, on the first

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Monday in July then next ensuing. But on the 26th of May his bail or surety in the recognizance delivered him to the marshal, in the presence of the commissioner, and requested the commissioner to recommit Booth to the custody of the marshal; and he having failed to recognize again for his appearance before the district court, the commissioner committed him to the custody of the marshal, to be delivered to the keeper of the jail until he should be discharged by due course of law.

Booth made application on the next day, the 27th of [* 508] May, * to A. D. Smith, one of the justices of the supreme court of the State of Wisconsin, for a writ of *habeas corpus*, stating that he was restrained of his liberty by Stephen V. R. Ableman, marshal of the United States for that district, under the warrant of commitment hereinbefore mentioned; and alleging that his imprisonment was illegal, because the act of congress of September 18, 1850, was unconstitutional and void; and also that the warrant was defective, and did not describe the offense created by that act, even if the act were valid.

Upon this application, the justice, on the same day, issued the writ of *habeas corpus*, directed to the marshal, requiring him forthwith to have the body of Booth before him, (the said justice,) together with the time and cause of his imprisonment. The marshal thereupon, on the day above mentioned, produced Booth, and made his return, stating that he was received into his custody as marshal on the day before, and held in custody by virtue of the warrant of the commissioner above mentioned, a copy of which he annexed to and returned with the writ.

To this return Booth demurred, as not sufficient in law to justify his detention. And upon the hearing the justice decided that his detention was illegal, and ordered the marshal to discharge him and set him at liberty, which was accordingly done.

Afterwards, on the 9th of June, in the same year, the marshal applied to the supreme court of the State for a *certiorari*, setting forth in his application the proceedings hereinbefore mentioned, and charging that the release of Booth by the justice was erroneous and unlawful, and praying that his proceedings might be brought before the supreme court of the State for revision.

The *certiorari* was allowed on the same day; and the writ was accordingly issued on the 12th of the same month, and returnable on the third Tuesday of the month; and on the 20th the return was made by the justice, stating the proceedings, as hereinbefore mentioned.

The case was argued before the supreme court of the State, and

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on the 19th of July it pronounced its judgment, affirming * the decision of the associate justice discharging Booth [* 509] from imprisonment, with costs against Ableman, the marshal.

Afterwards, on the 26th of October, the marshal sued out a writ of error, returnable to this court on the first Monday of December, 1854, in order to bring the judgment here for revision; and the defendant in error was regularly cited to appear on that day; and the record and proceedings were certified to this court by the clerk of the State court in the usual form, in obedience to the writ of error. And on the 4th of December, Booth, the defendant in error, filed a memorandum in writing in this court, stating that he had been cited to appear here in this case, and that he submitted it to the judgment of this court on the reasoning in the argument and opinions in the printed pamphlets therewith sent.

After the judgment was entered in the supreme court of Wisconsin, and before the writ of error was sued out, the State court entered on its record, that, in the final judgment it had rendered, the validity of the act of congress of September 18, 1850, and of February 12, 1793, and the authority of the marshal to hold the defendant in his custody, under the process mentioned in his return to the writ of *habeas corpus*, were respectively drawn in question, and the decision of the court in the final judgment was against their validity, respectively.

This certificate was not necessary to give this court jurisdiction, because the proceedings upon their face show that these questions arose, and how they were decided; but it shows that at that time the supreme court of Wisconsin did not question their obligation to obey the writ of error, nor the authority of this court to re-examine their judgment in the cases specified. And the certificate is given for the purpose of placing distinctly on the record the points that were raised and decided in that court, in order that this court might have no difficulty in exercising its appellate power, and pronouncing its judgment upon all of them.

We come now to the second case. At the January term of the district court of the United States for the district of Wisconsin, after Booth had been set at liberty, and after the transcript of the proceedings in the case above mentioned had been * returned to and filed in this court, the grand jury found [* 510] a bill of indictment against Booth for the offense with which he was charged before the commissioner, and from which the State court had discharged him. The indictment was found on the 4th of January, 1855. On the 9th a motion was made, by

counsel on behalf of the accused, to quash the indictment, which was overruled by the court, and he thereupon pleaded not guilty, upon which issue was joined. On the 10th a jury was called and appeared in court, when he challenged the array; but the challenge was overruled and the jury impaneled. The trial, it appears, continued from day to day, until the 13th, when the jury found him guilty in the manner and form in which he stood indicted in the fourth and fifth counts. On the 16th he moved for a new trial and in arrest of judgment, which motions were argued on the 20th, and on the 23d the court overruled the motions, and sentenced the prisoner to be imprisoned for one month, and to pay a fine of \$1,000 and the costs of prosecution; and that he remain in custody until the sentence was complied with.

We have stated more particularly these proceedings, from a sense of justice to the district court, as they show that every opportunity of making his defense was afforded him, and that his case was fully heard and considered.

On the 26th of January, three days after the sentence was passed, the prisoner by his counsel filed his petition in the supreme court of the State, and with his petition filed a copy of the proceedings in the district court, and also affidavits from the foreman and one other member of the jury who tried him, stating that their verdict was, guilty on the fourth and fifth counts, and not guilty on the other three; and stated in his petition that his imprisonment was illegal, because the fugitive slave law was unconstitutional; that the district court had no jurisdiction to try or punish him for the matter charged against him, and that the proceedings and sentence of that court were absolute nullities in law. Various other objections to the proceedings are alleged, which are unimportant in the questions now before the court, and need not, therefore, be particularly stated.

On the next day, the 27th, the court [* 511] directed * two writs of *habeas corpus* to be issued—one to the marshal, and one to the sheriff of Milwaukee, to whose actual keeping the prisoner was committed by the marshal, by order of the district court. The *habeas corpus* directed each of them to produce the body of the prisoner, and make known the cause of his imprisonment, immediately after the receipt of the writ.

On the 30th of January the marshal made his return, not acknowledging the jurisdiction, but stating the sentence of the district court as his authority; that the prisoner was delivered to, and was then in the actual keeping of the sheriff of Milwaukee county, by order of the court, and he therefore had no control of

the body of the prisoner ; and if the sheriff had not received him, he should so have reported to the district court, and should have conveyed him to some other place or prison, as the court should command.

On the same day the sheriff produced the body of Booth before the State court, and returned that he had been committed to his custody by the marshal, by virtue of a transcript, a true copy of which was annexed to his return, and which was the only process or authority by which he detained him.

This transcript was a full copy of the proceedings and sentence in the district court of the United States, as hereinbefore stated. To this return the accused, by his counsel, filed a general demurrer.

The court ordered the hearing to be postponed until the 2d of February, and notice to be given to the district attorney of the United States. It was accordingly heard on that day, and on the next, (February 3d,) the court decided that the imprisonment was illegal, and ordered and adjudged that Booth be, and he was by that judgment, forever discharged from that imprisonment and restraint, and he was accordingly set at liberty.

On the 21st of April next following, the attorney general of the United States presented a petition to the chief justice of the supreme court, stating briefly the facts in the case, and at the same time presenting an exemplification of the proceedings hereinbefore stated, duly certified by the clerk of the State court, and averring in his petition that the State court had no *jurisdiction [* 512] in the case, and praying that a writ of error might issue to bring its judgment before this court to correct the error. The writ of error was allowed and issued, and, according to the rules and practice of the court, was returnable on the first Monday of December, 1855, and a citation for the defendant in error to appear on that day was issued by the chief justice at the same time.

No return having been made to this writ, the attorney general, on the 1st of February, 1856, filed affidavits, showing that the writ of error had been duly served on the clerk of the supreme court of Wisconsin, at his office, on the 30th of May, 1855, and the citation served on the defendant in error on the 28th of June, in the same year. And also the affidavit of the district attorney of the United States for the district of Wisconsin, setting forth that when he served the writ of error upon the clerk, as above mentioned, he was informed by the clerk, and has also been informed by one of the justices of the supreme court, which released Booth, "*that the court had directed the clerk to make no return to the writ of error, and to enter no order upon the journals or records of the court concerning the*

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same." And, upon these proofs, the attorney general moved the court for an order upon the clerk to make return to the writ of error, on or before the first day of the next ensuing term of this court. The rule was accordingly laid, and on the 22d of July, 1856, the attorney general filed with the clerk of this court the affidavit of the marshal of the district of Wisconsin, that he had served the rule on the clerk on the 7th of the month above mentioned; and no return having been made, the attorney general, on the 27th of February, 1857, moved for leave to file the certified copy of the record of the supreme court of Wisconsin, which he had produced with his application for the writ of error, and to docket the case in this court, in conformity with a motion to that effect made at the last term. And the court thereupon, on the 6th of March, 1857, ordered the copy of the record filed by the attorney general to be received and entered on the docket of this court, to have the same effect and legal operation as if returned by the clerk with the writ of error, and that the case stand for argument [* 513] at the next ensuing term, without further notice to either party.

The case was accordingly docketed, but was not reached for argument in the regular order and practice of the court until the present term.

This detailed statement of the proceedings in the different courts has appeared to be necessary in order to form a just estimate of the action of the different tribunals in which it has been heard, and to account for the delay in the final decision of a case, which, from its character, would seem to have demanded prompt action. The first case, indeed, was reached for trial two terms ago. But as the two cases are different portions of the same prosecution for the same offense, they unavoidably, to some extent, involve the same principles of law, and it would hardly have been proper to hear and decide the first before the other was ready for hearing and decision. They have accordingly been argued together, by the attorney general of the United States, at the present term. No counsel has in either case appeared for the defendant in error. But we have the pamphlet arguments filed and referred to by Booth in the first case, as hereinbefore mentioned, also the opinions and arguments of the supreme court of Wisconsin, and of the judges who compose it, in full, and are enabled, therefore, to see the grounds on which they rely to support their decisions.

It will be seen, from the foregoing statement of facts, that a judge of the supreme court of the State of Wisconsin, in the first of these cases, claimed and exercised the right to supervise and annul

the proceedings of a commissioner of the United States, and to discharge a prisoner, who had been committed by the commissioner for an offense against the laws of this government, and that this exercise of power by the judge was afterwards sanctioned and affirmed by the supreme court of the State.

In the second case, the State court has gone a step further, and claimed and exercised jurisdiction over the proceedings and judgment of a district court of the United States, and upon a summary and collateral proceeding, by *habeas corpus*, * has [* 514] set aside and annulled its judgment, and discharged a prisoner who had been tried and found guilty of an offense against the laws of the United States, and sentenced to imprisonment by the district court.

And it further appears that the State court have not only claimed and exercised this jurisdiction, but have also determined that their decision is final and conclusive upon all the courts of the United States, and ordered their clerk to disregard and refuse obedience to the writ of error issued by this court, pursuant to the act of congress of 1789, to bring here for examination and revision the judgment of the State court.

These propositions are new in the jurisprudence of the United States, as well as of the States; and the supremacy of the State courts over the courts of the United States, in cases arising under the constitution and laws of the United States, is now for the first time asserted and acted upon in the supreme court of a State.

The supremacy is not, indeed, set forth distinctly and broadly, in so many words, in the printed opinions of the judges. It is intermixed with elaborate discussions of different provisions in the fugitive slave law, and of the privileges and power of the writ of *habeas corpus*. But the paramount power of the State court lies at the foundation of these decisions; for their commentaries upon the provisions of that law, and upon the privileges and power of the writ of *habeas corpus*, were out of place, and their judicial action upon them without authority of law, unless they had the power to revise and control the proceedings in the criminal case of which they were speaking; and their judgments, releasing the prisoner, and disregarding the writ of error from this court, can rest upon no other foundation.

If the judicial power exercised in this instance has been reserved to the States, no offense against the laws of the United States can be punished by their own courts, without the permission and according to the judgment of the courts of the State in which the party happens to be imprisoned; for, if the supreme court of Wisconsin

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possessed the power it has exercised in relation to offenses [* 515] against the act of congress in question, * it necessarily follows that they must have the same judicial authority in relation to any other law of the United States; and, consequently, their supervising and controlling power would embrace the whole criminal code of the United States, and extend to offenses against our revenue laws, or any other law intended to guard the different departments of the general government from fraud or violence. And it would embrace all crimes, from the highest to the lowest; including felonies, which are punished with death, as well as misdemeanors, which are punished by imprisonment. And, moreover, if the power is possessed by the supreme court of the State of Wisconsin, it must belong equally to every other State in the Union, when the prisoner is within its territorial limits; and it is very certain that the State courts would not always agree in opinion; and it would often happen, that an act which was admitted to be an offense, and justly punished, in one State, would be regarded as innocent, and indeed as praiseworthy, in another.

It would seem to be hardly necessary to do more than state the result to which these decisions of the State courts must inevitably lead. It is, of itself, a sufficient and conclusive answer; for no one will suppose that a government which has now lasted nearly seventy years, enforcing its laws by its own tribunals, and preserving the union of the States, could have lasted a single year, or fulfilled the high trusts committed to it, if offenses against its laws could not have been punished without the consent of the State in which the culprit was found.

The judges of the supreme court of Wisconsin do not distinctly state from what source they suppose they have derived this judicial power. There can be no such thing as judicial authority, unless it is conferred by a government or sovereignty; and if the judges and courts of Wisconsin possess the jurisdiction they claim, they must derive it either from the United States or the State. It certainly has not been conferred on them by the United States; and it is equally clear it was not in the power of the State to confer it, even

if it had attempted to do so; for no State can authorize [* 516] one of its judges * or courts to exercise judicial power, by *habeas corpus* or otherwise, within the jurisdiction of another and independent government. And although the State of Wisconsin is sovereign within its territorial limits to a certain extent, yet that sovereignty is limited and restricted by the constitution of the United States. And the powers of the general government, and of the State, although both exist and are exercised

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within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge or a State court, as if the line of division was traced by landmarks and monuments visible to the eye. And the State of Wisconsin had no more power to authorize these proceedings of its judges and courts, than it would have had if the prisoner had been confined in Michigan, or in any other State of the Union, for an offense against the laws of the State in which he was imprisoned.

It is, however, due to the State to say, that we do not find this claim of paramount jurisdiction in the State courts over the courts of the United States asserted or countenanced by the constitution or laws of the State. We find it only in the decisions of the judges of the supreme court. Indeed, at the very time these decisions were made, there was a statute of the State which declares that a person brought up on a *habeas corpus* shall be remanded, if it appears that he is confined:

"1st. By virtue of process, by any court or judge of the United States, in a case where such court or judge has exclusive jurisdiction; or,

"2d. By virtue of the final judgment or decree of any competent court of civil or criminal jurisdiction." (Revised Statutes of the State of Wisconsin, 1849, ch. 124, page 629.)

Even, therefore, if these cases depended upon the laws of Wisconsin, it would be difficult to find in these provisions such a grant of judicial power as the supreme court claims to have derived from the State.

But, as we have already said, questions of this kind must *always depend upon the constitution and laws of [*517] the United States, and not of a State. The constitution was not formed merely to guard the States against danger from foreign nations, but mainly to secure union and harmony at home; for if this object could be attained, there would be but little danger from abroad; and to accomplish this purpose, it was felt by the statesmen who framed the constitution, and by the people who adopted it, that it was necessary that many of the rights of sovereignty which the States then possessed should be ceded to the general government; and that, in the sphere of action assigned to it, it should be supreme, and strong enough to execute its own laws by its own tribunals, without interruption from a State or from State authorities. And it was evident that anything short of this

would be inadequate to the main objects for which the government was established ; and that local interests, local passions or prejudices, incited and fostered by individuals for sinister purposes, would lead to acts of aggression and injustice by one State upon the rights of another, which would ultimately terminate in violence and force, unless there was a common arbiter between them, armed with power enough to protect and guard the rights of all, by appropriate laws, to be carried into execution peacefully by its judicial tribunals.

The language of the constitution, by which this power is granted, is too plain to admit of doubt or to need comment. It declares that "this constitution, and the laws of the United States which shall be passed in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

But the supremacy thus conferred on this government could not peacefully be maintained, unless it was clothed with judicial power, equally paramount in authority to carry it into execution ; for if left to the courts of justice of the several States, conflicting decisions would unavoidably take place, and the local tribunals [* 518] could hardly be expected to be always free *from the local influences of which we have spoken. And the constitution and laws and treaties of the United States, and the powers granted to the federal government, would soon receive different interpretations in different States, and the government of the United States would soon become one thing in one State and another thing in another. It was essential, therefore, to its very existence as a government, that it should have the power of establishing courts of justice, altogether independent of State power, to carry into effect its own laws ; and that a tribunal should be established in which all cases which might arise under the constitution and laws and treaties of the United States, whether in a State court or a court of the United States, should be finally and conclusively decided. Without such a tribunal, it is obvious that there would be no uniformity of judicial decision ; and that the supremacy, (which is but another name for independence,) so carefully provided in the clause of the constitution above referred to, could not possibly be maintained peacefully, unless it was associated with this paramount judicial authority.

Accordingly, it was conferred on the general government, in clear, precise, and comprehensive terms. It is declared that its

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judicial power shall (among other subjects enumerated) extend to all cases in law and equity arising under the constitution and laws of the United States, and that in such cases, as well as the others there enumerated, this court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as congress shall make. The appellate power, it will be observed, is conferred on this court in all cases or suits in which such a question shall arise. It is not confined to suits in the inferior courts of the United States, but extends to all cases where such a question arises, whether it be in a judicial tribunal of a State or of the United States. And it is manifest that this ultimate appellate power in a tribunal created by the constitution itself was deemed essential to secure the independence and supremacy of the general government in the sphere of action assigned to it; to make the constitution and laws of the United States uniform, and the same in every State; and to guard against evils which would * inevitably [* 519] arise from conflicting opinions between the courts of a State and of the United States, if there was no common arbiter authorized to decide between them.

The importance which the framers of the constitution attached to such a tribunal, for the purpose of preserving internal tranquility, is strikingly manifested by the clause which gives this court jurisdiction over the sovereign States which compose this Union, when a controversy arises between them. Instead of reserving the right to seek redress for injustice from another State by their sovereign powers, they have bound themselves to submit to the decision of this court, and to abide by its judgment. And it is not out of place to say, here, that experience has demonstrated that this power was not unwisely surrendered by the States; for in the time that has already elapsed since this government came into existence, several irritating and angry controversies have taken place between adjoining States, in relation to their respective boundaries, and which have sometimes threatened to end in force and violence, but for the power vested in this court to hear them and decide between them.

The same purposes are clearly indicated by the different language employed when conferring supremacy upon the laws of the United States, and jurisdiction upon its courts. In the first case, it provides that "this constitution, and the laws of the United States *which shall be made in pursuance thereof*, shall be the supreme law of the land, and obligatory upon the judges in every State." The words in italics show the precision and foresight which marks every clause in the instrument. The sovereignty to be created was to be

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limited in its powers of legislation, and if it passed a law not authorized by its enumerated powers, it was not to be regarded as the supreme law of the land, nor were the State judges bound to carry it into execution. And as the courts of a State, and the courts of the United States, might, and indeed certainly would, often differ as to the extent of the powers conferred by the general government, it was manifest that serious controversies would arise between the authorities of the United States and of the States, which must be settled by force of arms, unless some [* 520] * tribunal was created to decide between them finally and without appeal.

The constitution has accordingly provided, as far as human foresight could provide, against this danger. And in conferring judicial power upon the federal government, it declares that the jurisdiction of its courts shall extend to all cases arising under "this constitution" and the laws of the United States—leaving out the words of restriction contained in the grant of legislative power which we have above noticed. The judicial power covers every legislative act of congress, whether it be made within the limits of its delegated powers, or be an assumption of power beyond the grants in the constitution.

This judicial power was justly regarded as indispensable, not merely to maintain the supremacy of the laws of United States, but also to guard the States from any encroachment upon their reserved rights by the general government. And as the constitution is the fundamental and supreme law, if it appears that an act of congress is not pursuant to and within the limits of the power assigned to the federal government, it is the duty of the courts of the United States to declare it unconstitutional and void. The grant of judicial power is not confined to the administration of laws passed in pursuance to the provisions of the constitution, nor confined to the interpretation of such laws; but, by the very terms of the grant, the constitution is under their view when any act of congress is brought before them, and it is their duty to declare the law void, and refuse to execute it, if it is not pursuant to the legislative powers conferred upon congress. And as the final appellate power in all such questions is given to this court, controversies as to the respective powers of the United States and the States, instead of being determined by military and physical force, are heard, investigated, and finally settled, with the calmness and deliberation of judicial inquiry. And no one can fail to see, that if such an arbiter had not been provided, in our complicated system of government, internal tranquillity could not have been preserved; and if such

controversies were left to arbitrament of physical force, our government, State and national, would soon cease to be governments * of laws, and revolutions by force of arms would [* 521] take the place of courts of justice and judicial decisions.

In organizing such a tribunal, it is evident that every precaution was taken, which human wisdom could devise, to fit it for the high duty with which it was intrusted. It was not left to congress to create it by law; for the States could hardly be expected to confide in the impartiality of a tribunal created exclusively by the general government, without any participation on their part. And as the performance of its duty would sometimes come in conflict with individual ambition or interests, and powerful political combinations, an act of congress establishing such a tribunal might be repealed in order to establish another more subservient to the predominant political influences or excited passions of the day. This tribunal, therefore, was erected, and the powers of which we have spoken conferred upon it, not by the federal government, but by the people of the States, who formed and adopted that government, and conferred upon it all the powers, legislative, executive, and judicial which it now possesses. And in order to secure its independence, and enable it faithfully and firmly to perform its duty, it engrafted it upon the constitution itself, and declared that this court should have appellate power in all cases arising under the constitution and laws of the United States. So long, therefore, as this constitution shall endure, this tribunal must exist with it, deciding in the peaceful forms of judicial proceeding the angry and irritating controversies between sovereignties, which in other countries have been determined by the arbitrament of force.

These principles of constitutional law are confirmed and illustrated by the clause which confers legislative power upon congress. That power is specifically given in article 1, section 8, paragraph 18, in the following words;

“To make all laws which shall be necessary and proper to carry into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.”

Under this clause of the constitution, it became the duty of congress to pass such laws as were necessary and proper to * carry into execution the powers vested in the judicial [* 522] department. And in the performance of this duty, the first congress, at its first session, passed the act of 1789, ch. 20, entitled “ *An act to establish the judicial courts of the United States* ” It will be remembered that many of the members of the co-

were also members of this congress, and it cannot be supposed that they did not understand the meaning and intention of the great instrument which they had so anxiously and deliberately considered, clause by clause, and assisted to frame. And the law they passed to carry into execution the powers vested in the judicial department of the government proves, past doubt, that their interpretation of the appellate powers conferred on this court was the same with that which we have now given; for by the 25th section of the act of 1789, congress authorized writs of error to be issued from this court to a State court, whenever a right had been claimed under the constitution or laws of the United States, and the decision of the State court was against it. And to make this appellate power effectual, and altogether independent of the action of State tribunals, this act further provides that upon writs of error to a State court, instead of remanding the cause for a final decision in the State court, this court may at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution.

These provisions in the act of 1789 tell us, in language not to be mistaken, the great importance which the patriots and statesmen of the first congress attached to this appellate power, and the foresight and care with which they guarded its free and independent exercise against interference or obstruction by States or State tribunals.

In the case before the supreme court of Wisconsin, a right was claimed under the constitution and laws of the United States, and the decision was against the right claimed; and it refuses obedience to the writ of error, and regards its own judgment as final. It has not only reversed and annulled the judgment of the district court of the United States, but it has reversed and annulled the [* 523] provisions of the constitution itself, * and the act of congress of 1789, and made the superior and appellate tribunal the inferior and subordinate one.

We do not question the authority of State court, or judge, who is authorized by the laws of the State to issue the writ of *habeas corpus*, to issue it in any case where the party is imprisoned within its territorial limits, provided it does not appear, when the application is made, that the person imprisoned is in custody under the authority of the United States. The court or judge has a right to inquire, in this mode of proceeding, for what cause and by what authority the prisoner is confined within the territorial limits of the State sovereignty. And it is the duty of the marshal, or other person having the custody of the prisoner, to make known to the judge or

court, by a proper return, the authority by which he holds him in custody. This right to inquire by process of *habeas corpus*, and the duty of the officer to make a return, grows, necessarily, out of the complex character of our government, and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each within its sphere of action, prescribed by the constitution of the United States, independent of the other. But, after the return is made, and the State judge or court judicially apprized that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion and jurisdiction of another government, and that neither the writ of *habeas corpus*, nor any other process issued under State authority, can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United States. If he has committed an offense against their laws, their tribunals alone can punish him. If he is wrongfully imprisoned, their judicial tribunals can release him and afford him redress. And although, as we have said, it is the duty of the marshal, or other person holding him, to make known, by a proper return, the authority under which he detains him, it is at the same time imperatively his duty to obey the process of the United States, to hold the prisoner in custody under it, and to refuse obedience to the mandate or *process of any other govern- [* 524] ment. And consequently it is his duty not to take the prisoner, nor suffer him to be taken, before a State judge or court upon a *habeas corpus* issued under State authority. No State judge or court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or to require him to be brought before them. And if the authority of a State, in the form of judicial process or otherwise, should attempt to control the marshal or other authorized officer or agent of the United States, in any respect, in the custody of his prisoner, it would be his duty to resist it, and to call to his aid any force that might be necessary to maintain the authority of law against illegal interference. No judicial process, whatever form it may assume, can have any lawful authority outside of the limits of the jurisdiction of the court or judge by whom it is issued; and an attempt to enforce it beyond these boundaries is nothing less than lawless violence.

Nor is there anything in this supremacy of the general government, or the jurisdiction of its judicial tribunals, to awaken the jealousy or offend the natural and just pride of State sovereignty.

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Neither this government, nor the powers of which we are speaking, were forced upon the States. The constitution of the United States, with all the powers conferred by it on the general government, and surrendered by the States, was the voluntary act of the people of the several States, deliberately done, for their own protection and safety against injustice from one another. And their anxiety to preserve it in full force, in all its powers, and to guard against resistance to or evasion of its authority, on the part of a State, is proved by the clause which requires that the members of the State legislatures, and all executive and judicial officers of the several States, (as well as those of the general government,) shall be bound, by oath or affirmation, to support this constitution. This is the last and closing clause of the constitution, and inserted when the whole frame of government, with the powers hereinbefore specified, had been adopted by the convention; and it was [* 525] in that form, and with these powers, that the * constitution was submitted to the people of the several States, for their consideration and decision.

Now, it certainly can be no humiliation to the citizen of a republic to yield a ready obedience to the laws as administered by the constituted authorities. On the contrary, it is among his first and highest duties as a citizen, because free government cannot exist without it. Nor can it be inconsistent with the dignity of a sovereign State to observe faithfully, and in the spirit of sincerity and truth, the compact into which it voluntarily entered when it became a State of this Union. On the contrary, the highest honor of sovereignty is untarnished faith. And certainly no faith could be more deliberately and solemnly pledged than that which every State has plighted to the other States to support the constitution as it is, in all its provisions, until they shall be altered in the manner which the constitution itself prescribes. In the emphatic language of the pledge required, it is *to support this constitution*. And no power is more clearly conferred by the constitution and laws of the United States, than the power of this court to decide, ultimately and finally, all cases arising under such constitution and laws; and for that purpose to bring here for revision, by writ of error, the judgment of a State court, where such questions have arisen, and the right claimed under them denied by the highest judicial tribunal in the State.

We are sensible that we have extended the examination of these decisions beyond the limits required by any intrinsic difficulty in the questions. But the decisions in question were made by the supreme judicial tribunal of the State; and when a court so elevated

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in its position has pronounced a judgment which, if it could be maintained, would subvert the very foundations of this government, it seemed to be the duty of this court, when exercising its appellate power, to show plainly the grave errors into which the State court has fallen, and the consequences to which they would inevitably lead. But it can hardly be necessary to point out the errors which followed their mistaken view of the jurisdiction they might lawfully exercise; because, if there was any defect of power in the commissioner, or in his mode of proceeding, it was for the * tribunals of the United States to revise and correct [* 526] it, and not for a State court. And as regards the decision of the district court, it had exclusive and final jurisdiction by the laws of the United States; and neither the regularity of its proceedings nor the validity of its sentence could be called in question in any other court, either of a State or the United States, by *habeas corpus* or any other process.

But although we think it unnecessary to discuss these questions, yet, as they have been decided by the State court, and are before us on the record, and we are not willing to be misunderstood, it is proper to say that, in the judgment of this court, the act of congress commonly called the fugitive slave law is, in all of its provisions, fully authorized by the constitution of the United States; that the commissioner had lawful authority to issue the warrant and commit the party, and that his proceedings were regular and conformable to law. We have already stated the opinion and judgment of the court as to the exclusive jurisdiction of the district court, and the appellate powers which this court is authorized and required to exercise. And if any argument was needed to show the wisdom and necessity of this appellate power, the cases before us sufficiently prove it, and at the same time emphatically call for its exercise.

The judgment of the supreme court of Wisconsin must therefore be reversed in each of the cases now before the court.

LLOYD N. ROGERS and others, Appellants, v. JOSEPH E. LAW, by
MARY ROBINSON, his next friend.

21 H. 526.

PRACTICE IN SUPREME COURT.

Where an appeal has been docketed and dismissed under rule 63 at one term, the same case cannot be docketed and heard at another term without another appeal.

THE facts on which the order to dismiss was based are stated in the opinion.

The Ship Alboni.

[* 527] * Mr. Justice McLEAN delivered the opinion of the court.

The facts, as they appear of record, on the motion to dismiss this appeal, are as follows:

The decree of the circuit court was pronounced 21st January, 1856. An appeal was prayed from said decree, and granted the same day, 21st January, 1856. This appeal was docketed and dismissed under the 63d rule of this court, at December term, 1856, to wit: 27th February, 1857; and a writ of *procedendo* was issued 19th May, 1857.

The appellants filed this record and docketed the case 3d April, 1857. The record in this case stated that an appeal had been prayed and allowed, but does not give any date. There is no statement of any prior appeal in this record. The appeal bond is dated 4th February, 1856. There is no citation in this record.

The appellants filed the citation and bond, 30th April, 1857, and directed the clerk to docket this case, to transfer the record filed in the last case to this, to attach said citation and bond to said record, and to print all the papers in this case. There is no statement of any other appeal than that set out; and this seems to be the appeal that was docketed and dismissed 27th February, 1857.

As the record now stands, it is not perceived how this appeal can be sustained.

THE SHIP ALBONI.

JOHN W. BRITTAN, Appellant, v. WILLIAM A. BARNABY, Claimant.

21 H. 527.

ADMIRALTY—WHEN FREIGHT IS DUE IN POINT OF TIME.

1. The general rule is that delivery of goods at the place of destination, or readiness to deliver, is a precedent condition to the right to demand payment of freight.
2. If the shipment is large, so that it cannot be landed in one day, the master may require a *pro rata* payment, as regards value, before the parcels first landed can be taken away; but he cannot demand payment for all on delivery of a part.
3. Words stamped on the back of the bill of lading by the master, without evidence of the assent of the consignee or owner of the goods, cannot vary this rule so as to authorize a demand of payment for all before any of the goods are ready for delivery.

THIS was an appeal in admiralty from the circuit court for the district of California. The case is very fully stated in the opinion.

Mr. Sherwood, for appellant.

Mr. Brown, for appellee.

21h 527
L-ed 177
38f 38
38f 39
38f 44

Brittan v. Barnaby.

* Mr. Justice WAYNE delivered the opinion of the court. [* 531]

This cause involves an important commercial principle, of daily recurrence in practice, which does not appear to be well understood and settled in San Francisco. Our decision will correct the misapprehension there in regard to the delivery of merchandise by ship-owners, and the payment of freight for its transportation.

The libelant was the owner and consignee of goods of a value exceeding four thousand dollars, which were shipped in good order and condition at New York, on board of the ship *Alboni*, to be carried and delivered in San Francisco, in the same order, at a rate of freight expressed in the bill of lading. It amounted to two hundred and forty-seven dollars and twelve cents, including eleven dollars and seventy-seven cents for primage. The bill of lading, upon its face, is in the ordinary form; but there was a stamp upon the back of it, in these words: "That the goods were to be delivered at the ship's tackles when ready for delivery—not accountable for loss or damage by fire or collision; freight payable prior to delivery, if required; contents unknown." The proctors in the cause agreed that those words were stamped on the original bill of lading.

The ship arrived at San Francisco. Notice of it was given to the libelant by the consignee of the ship; and he also required payment of the freight of the goods as they should be landed from the ship on the wharf, and that if it was not paid, and the goods received by four o'clock of the day, such of them as had been landed would be placed in a warehouse for safe keeping, at the expense of the libelant. The notice and the requirement are taken from the second article of the respondent's answer to the libel. He adds, that the libelant had refused to pay the freight according to the terms of the bill of lading.

The testimony discloses what the respondent considered to be its terms, and the refusal of the libelant to acquiesce in his interpretation.

* The goods were landed from the ship in parcels, on [* 532] different days, from the 24th. to the 27th of October, inclusive. The clerk of the libelant attended on each day to receive them. In conformity to the notice which had been given, he offered to pay the freight of such of the merchandise as had been landed. The consignee of the ship refused to receive it, or to deliver such goods, claiming that he had a right to demand the freight upon the whole shipment, when he was only ready to deliver a part of it. In the assertion of this right (certainly not in conformity with the notice he had given to the libelant) the respondent from day to day warehoused the goods.

The Ship *Alboni*.

The libelant did all he was bound to do under the notice which had been given to him. He could not have done more. The respondent's refusal to deliver the parcels as they were landed cannot be justified, under the notice he had given, by any delay there may have been in the delivery, either from the necessity of weighing or measuring them, or from the claim made by him to have the freight paid upon the whole shipment before he would deliver a part of it. He had taken his course, and the libelant acquiesced in it, by offering to pay the freight on each parcel as it was put on the wharf, though not bound to do so by the commercial law. The respondent's refusal has no justification, either in law, nor can it be vindicated by any evidence in the cause.

We do not mean to say that the libelant had a right to take the parcels on the days they were landed, without the payment of a *pro rata* freight; but where a ship-master has a larger shipment under one bill of lading than he can land in the business hours of a day, as he has the control of unloading the cargo, he must take care not to do it in such quantities that he may not be able to have the *pro rata* freight ascertained in the only way in which it can be done. Until it shall be done, he is not in readiness to deliver such part, or to demand the freight which may be due upon it. Goods so landed will be under his care and responsibility, without additional expense to the consignee of them, until they shall be ready for delivery.

Ordinarily, no difficulty arises between the ship's owner [*533] and the consignee of the goods; their interest, convenience, and responsibilities, usually suggest to them some arrangement for the freight beforehand, by which goods landed from day to day may be taken without delay by the consignee of them. In this instance, however, no opportunity was given to the libelant to make such an arrangement, the consignee of the ship having absolutely demanded the whole freight of the shipment as the condition for the delivery of any part of it.

On the fourth day, when all of the libelant's shipment had been landed, and before they were sent to a warehouse, he demanded from the consignee of the ship a delivery order for all the merchandise specified in the bill of lading, tendering at the same time, in gold, the whole freight due. The delivery order was refused, the answer being that the goods were subject, in addition to the freight, to a charge for storage and cartage. The last was also warehoused by the respondent, as those of the three previous landings had been.

The foregoing is a sufficient statement of the facts and evidence

in this case for the decision of it. It will not be necessary to notice again the attendance of the clerk of the libellant on the days of landing, to receive the goods and pay the freight.

The word freight, when not used in a sense to imply the burden or loading of the ship; or the cargo which she has on board, is the hire agreed upon between the owner or master for the carriage of goods from one port or place to another. That hire, without a different stipulation by the parties, is only payable when the merchandise is in readiness to be delivered to the person having the right to receive it. Then the freight must be paid before an actual delivery can be called for. In other words, the rule is, in the absence of any agreement to the contrary of it, that freight, under an ordinary bill of lading, is only demandable by the owner, master, or consignee of the ship, when they are ready to deliver the goods in the like good order as they were when they were received on board the ship. Such is the general rule. Neither party can *require* from the other that the merchandise shipped under one bill of lading shall be put up into parcels for delivery, or for the payment of freight. They may do so by stipulation in the bill of lading, * or by subsequent agreement, for either [* 534] of the purposes just mentioned. The master is bound to deliver the goods in a reasonable time. What may be so, depends upon the facilities there may be for the discharge of the cargo at the port of delivery, and the impediments in the way of it. When the shipment is large, or, from the master's storage of it, it cannot be landed in a day, if he lands a part of it, his lien upon the whole gives him the power to ask from the consignee of the merchandise a satisfactory security for the payment of the entire freight as called for by the bill of lading. But a security or arrangement is all that he can ask. He may not demand that the whole freight of the shipment should be paid before the consignee has had the opportunity to examine his goods, to see if the obligations of the bill of lading have been fulfilled by the ship-owner. Nor is the ship bound to land an entire shipment in a day, for the proper storage of the goods is the master's care, and he may do it in such a way as may be most advantageous to the ship, taking care that it shall not be done to the injury of the goods, or in such a manner as to produce unreasonable delay in the delivery of them. And when landings of the same shipment are made on different days, if the shipper disregards the notice given to him that such will be the case, and he shall not be present to receive the goods, and has not made an arrangement to secure the payment of the freight, they may be stored for safe keeping at the consignee's expense

The Ship Albion.

and risk, in the ship-owner's name, to preserve his lien for the freight. This course was not pursued in this case by the consignee of the ship. He attempts to justify what he did upon the allegation in his answer to the libel, that the bill of lading contained a stipulation, that the freight to be earned on the whole shipment was payable when a portion of it had been landed.

The bill of lading, upon the face of it, is the ordinary one between parties for the transportation of merchandise. The merchandise mentioned in it was to be carried from New York to San Francisco at fixed rates for freight, with primage and average accustomed. There is no other stipulation or condition in [* 535] it than the undertaking for carrying the goods, and * that of the shipper to pay the freight. But the consignee of the ship claimed that the stamp upon the back of the bill of lading was equivalent to one. So his counsel contended in argument. This stamp was in red ink, and was put on the bill of lading by the ship's owner. We will suppose it had been made by Captain Barnaby before he signed the bill of lading. But it was not signed by the parties, nor is there any proof that it was ever recognized by the shipper as a part of his contract. Nothing seems to have been said about it when the bill of lading was signed, nor until it was claimed in San Francisco to be a part of it. It no doubt has a relation to the subject-matter of the bill of lading, and was put there by Captain Barnaby for that purpose; but unless it received the assent of the shipper, it cannot vary the obligations of the contract so as to authorize a demand for freight before the goods were ready for delivery. The question we are now considering is not what effect might be given to such a stamp upon a bill of lading by proof that the parties, at the time it was made, adopted it as a stipulation or agreement that the shipper was to pay the whole freight upon his shipment when a portion of it had been landed from the ship; but the question is, whether such a stamp, *of itself*, upon a bill of lading, can change the well-known commercial rule in respect to the delivery of goods and the payment of freight. It is that which is asked in this case by the respondent. There is not a word of proof that the shippers in New York, or the consignee in San Francisco, ever regarded it in such a light; none that Captain Barnaby considered the stamp to be a part of the bill of lading assented to by the shipper, until it was asserted by him to be so, in his answer, after the consignee of the ship had attempted to enforce it, as a part of the contract, upon the libellant. It was properly resisted. The personal obligation to pay freight rests upon a bill of lading, when one has been given, and the payment

of it is made a condition of delivery. The general rule is, that the delivery of the goods at the place of destination, according to the bill of lading, is necessary to entitle the ship to freight. The conveyance and delivery is a condition precedent, and must be fulfilled. (3 Kent, 218.)

* Such a stamp cannot be considered a stipulation, ac- [* 536]
 cording to the legal meaning of that word. All writers upon commercial law use the word stipulation to denote a particular engagement, which may be insisted upon, before it can control the general operation of law, or vary a contract. Such stipulations are not uncommon between ship-owners and shippers of merchandise, in charter-parties and in bills of lading. But when done in either, they must be made in words sufficiently intelligible to indicate an agreement that the operation of the law merchant, in respect to those instruments, is not to prevail; and the stipulation must be in writing and be signed by the parties, before it can be received as an auxiliary to explain how the contract is to be performed. A memorandum or stamp upon the back of a bill of lading is insufficient for such a purpose, though the ship-owner may have made it as an intimation of *his mode* of doing business, or that a practice prevailed in conformity with it at the port to which the goods were to be carried and delivered to a consignee. An attempt was made to assimilate the stamp in this case to a memorandum on a policy of insurance. In the first place, as loose, indefinite, and dangerous, as some of the decisions in the English and American reports are concerning memorandums of that kind, no case can be found in either, in which effect has been given to any memorandum which was not on the face or in the margin of the policy. But if such a case can be found, we should not feel ourselves at liberty to extend it to a bill of lading for the transportation of merchandise.

Those instruments of commerce are construed by very different principles and usages. The cases cited by counsel to show that the memorandums upon the face of the one were analogous to a stamp put upon a bill of lading, do not apply. Neither do the texts from Daer, 75, 141, do so. The rule in respect to policies of insurance is, that it is not material whether the written words of a policy are inserted in the body of the instrument, or written on its face or on the margin of it; but they must be there in fact; must have been written before the execution of it, or by mutual consent after the execution, and before the commencement of the risk. Thus they * then form parts of the contract, it having been de- [* 537]
 termined, from the usages of insurances, that the parties contracted in reference to them, and that the signature and ac-

The Ship *Alboni*.

ceptance of the policy was proof that they had done so. All of the other cases cited are agreements, varying, in some particulars, the payment of notes of hand, entered into contemporaneously with the execution of the notes, and which by proofs, were shown to have been meant by the parties to be a part of them. An attempt was also made to show that a practice prevailed in San Francisco which gave an effect to the stamp upon the bill of lading, so as to control the general rules of commercial law in respect to the payment of freight, and the delivery of merchandise from ships. Whatever may be the practice there, or however general it may be, it is too recent in its use to make an exception, on the ground that it was a custom. The trade of San Francisco is already large; every day develops its resources and the advantages of its position for commerce. No doubt it has not as yet those facilities for the landing of merchandise and loading of ships which our older ports have; but that will not give to any practice there, however general it may have become, the force of custom to release its merchants from the obligation of an ordinary bill of lading. If inconveniences exist in the particular just mentioned, it will be best for the merchants of San Francisco, and those with whom they deal in other parts of the world, that the contract of a bill of lading should have its fixed meaning and obligation, and that it is only alterable by express stipulations made in the way which has been already stated in the decision.

The testimony, however, in this case shows a very uncertain opinion and a fluctuating practice in San Francisco upon the subject of the delivery of shipments of goods and the payment of freight; that such a demand as was made upon the libellant to pay his freight upon all the merchandise mentioned in his bill of lading, when only a portion of it had been landed upon the wharf, had only been acquiesced in by many of the merchants there to avoid trouble, to get early possession of their importations, and from an unwillingness to be troubled with lawsuits. There are [* 538] also differences of opinion as to the efficacy * of such a stamp as there was upon the bill of lading in this case, many of them, from their experience and knowledge of trade elsewhere, having a more correct apprehension of the commercial law than the reverse of it, which was attempted to be imposed upon the libellant. Nor can any previous assent to the usage of a particular firm engaged in the shipping business, though acquiesced in by one who had had other dealings with it, be interpreted into an agreement so as to deprive him of a right under an ordinary bill of lading subsequently made.

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The view which we have given of this case determines the whole controversy. It comprehends every point raised by the record, or made in the argument of it. The respondent having in the first instance demanded the entire freight called for by the bill of lading, without any right to do so, and having refused to deliver the merchandise belonging to the libelant when the last parcel of it was landed on the wharf, and when the freight due upon the whole of it was tendered, on the ground that there were due charges for cartage and storage, *did so without color of law* for such refusal. Our judgment is, that those charges must be paid by the respondent, and we shall reverse the decision of the court below, and direct a mandate to be sent to the circuit court to order a decree for the libelant for the sum of four thousand three hundred and sixty-seven dollars forty-five cents, with interest from the 2d day of November, 1855. (9th vol. Stat. at L., 181.)

The sum mentioned is proved to have been the value of the libelant's merchandise after freight and primage had been deducted, when it was wrongfully detained by the respondent. The respondent will also be charged with the costs which have been incurred in the prosecution of this libel.

Mr. Justice DANIEL dissents to the decision in this case, upon the grounds that the court of admiralty in this country, as in England, can take no cognizance of charter-parties or bills of lading, and because this case was within the plain jurisdiction of the courts of the State of California, either at common law or in equity.

THE BOARD OF COMMISSIONERS OF THE COUNTY OF KNOX, Plaintiffs in
Error, v. W. H. ASPINWALL and others.

21 H. 539.

COUNTY BONDS—COUPONS.

1. Where the act which authorizes a municipal corporation to issue bonds is a public statute of the State, a purchaser of such bonds is chargeable with knowledge of the statute, and he must show that agents issuing the bonds were authorized to do so.
2. But where such officers (as county commissioners) are authorized to issue bonds upon a vote of the majority of the people, they must of necessity first decide whether such vote was lawfully given; and this decision cannot be called in question collaterally in a suit on such bonds brought by an innocent purchaser for value, they being negotiable, though such decision might not be conclusive in a direct proceeding to inquire into the facts, before the rights of third parties had attached.
3. A suit may be maintained for interest on the coupons which had been attached to such bonds, without the production of the bonds.

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THIS is a writ of error to the circuit court for the district of Indiana. The case is fully stated in the opinion.

Mr. Reverdy Johnson, Mr. R. W. Thompson, Mr. McDonald, and Mr. Porter, for plaintiffs.

Mr. Benjamin, Mr. Vinton, and Mr. Judah, for defendants.

[* 540] * Mr. Justice NELSON delivered the opinion of the court.

This is a writ of error to the circuit court of the United States for the district of Indiana.

The suit was brought in the court below against the board of commissioners of Knox county, to recover the amount due upon two hundred and eighty-four coupons, each for the sum of sixty dollars, the whole amounting to the sum of seventeen

[* 541] * thousand and forty dollars. The coupons were payable at the North River Bank, in the city of New York—one hundred and forty-two of them on the 1st of March, 1856, and the remaining number on the 1st of March, 1857. These coupons were originally attached to one hundred and forty-two bonds issued by the defendants, for \$1,000 each, the bonds payable at the bank above mentioned, twenty-five years from date, to the Ohio and Mississippi Railroad Company, or bearer, with interest at the rate of six per cent. per annum, payable annually on the 1st of March, at the bank, upon presentation and delivery of the proper coupons hereto attached, by the auditor of said county.

The coupons declared upon and sought to be recovered are those which were attached to these one hundred and forty-two bonds, and represented the interest due thereon on the first of March, 1856 and 1857. The plaintiffs are the holders and owners of these coupons.

The main ground of the defense set up and relied on to defeat the recovery is, that the defendant, the board of commissioners, possessed no authority to execute, or to authorize to be executed, the bonds or coupons in question; and hence, that they are obligations not binding upon the county of Knox, which this board represents. Our chief inquiry, therefore, will be, whether or not these several obligations were executed and put into circulation, as evidences of indebtedness, by competent and legal authority.

The defendant is a body corporate, under the laws of the State of Indiana, by the name of the board of commissioners of the county, and very large powers are conferred upon it in matters relating to the police and fiscal concerns of the county. The auditor of the county is to act as its clerk, and the sheriff is to attend its meetings

and execute its orders. It has a common seal, and copies of its proceedings, signed and sealed by the clerk, are evidence in courts of justice. It has power to dispose of the property of the county; to adjust accounts against it; to raise revenue, and examine accounts of disbursing officers; and an appeal lies from its decisions to the circuit court. (1 R. S. of Indiana, pp. 180, 187.)

* On the 14th February, 1848, the legislature of Indiana [* 542] incorporated the Ohio and Mississippi Railroad Company, and by the 12th section of the charter provided as follows:

"It shall be lawful for the county commissioners of any county in the State of Indiana through which said railroad passes, for and in behalf of said county, to authorize, by order on their records, so much of said stock to be taken in said railroad as they may deem proper, at any time within five years after opening the books of subscription to said stock: *Provided, however,* That it shall be, and is hereby made, the duty of said county commissioners, in any county through which said railroad may pass in the State of Indiana, to subscribe for stock for and on behalf of said county, if a majority of the qualified voters of said county, at any annual election, within five years after said books are opened, shall vote for the same." (Sess. Laws 1848, page 619.)

This act was amended on the 15th January, 1849; and in the second section it was declared to be the duty of the sheriffs of the counties—and, among others, Knox county, the one in question—forthwith to give notice of an election to be held on the first Monday of March then next, to determine whether said county would subscribe for the stock of the Ohio and Mississippi Railroad Company, &c.; and if a majority of the votes shall be given in favor of the subscription, the county board of commissioners shall subscribe to said stock, &c., for the county, to an amount not less than \$100,000: *Provided,* That the county board of any of said counties may, within one week prior to said election, increase or lessen the amount to be subscribed, of which notice shall be given at the different precincts of said county on the day of the election, &c.

The third section provided that the county subscription shall be payable in county bonds, bearing interest at the rate of six per cent. per annum, payable annually on the first day of March, redeemable at such time and place as the directors of the company may determine, within thirty years from the date of the subscription. The section then provides for the levying of a tax annually upon the county by the board of commissioners, to meet the accruing interest on the bonds.

* The plaintiffs gave in evidence, on the trial, that at a [* 543]

meeting of the board of commissioners of the county of Knox, on the 26th February, 1849, it ordered, under the power given in the second section above referred to, that the county subscribe \$200,000 of the capital stock of the Ohio and Mississippi Railroad Company. And, also, that at a meeting on the 25th October, 1850, after reciting that, in accordance with the wishes of the voters of the county, as expressed at the election held for that purpose in the several townships on the first Monday of March, 1849, it is ordered that the auditor, in the name and for the county of Knox, subscribe to the capital stock of the Ohio and Mississippi Railroad Company four thousand shares of fifty dollars each, or the sum of \$200,000; and that the auditor be authorized to vote at all elections and meetings of stockholders, or to appoint a proxy in his stead. And that, in pursuance of this direction, the auditor subscribed the four thousand shares, and received certificates in the name of the board of commissioners of the county for the same; and also executed and delivered the bonds of the county, as provided for in the third section of the act of 1849, attaching thereto coupons for the interest. The bonds and coupons in question were issued under this authority.

This is the substance of the case, as presented on the record.

The ground upon which the want of authority to execute the bonds in question is placed, is the alleged omission to comply with the requisition of the statute of 1849, in respect to the notices to be given of the election to be held on the first Monday of March, at which a vote was to be taken for or against a subscription of stock to the railroad company.

It is insisted that an irregularity or omission in these notices had the effect to deprive the board of this authority, or rather furnish evidence that the power had never vested in it under the act; and, further, that the plaintiffs are chargeable with a knowledge of all substantial defects or irregularities in these notices of the election, and not therefore entitled to the character of *bona fide* holders of the securities.

The act in pursuance of which the bonds were issued is a public statute of a State, and it is undoubtedly true that any [* 544] * person dealing in them is chargeable with a knowledge of it; and as this board was acting under delegated authority, he must show that the authority has been properly conferred. The court must therefore look into the statute for the purpose of determining this question; and upon looking into it, we see that full power is conferred upon the board to subscribe for the stock and issue the bonds, when a majority of the voters of the county have

determined in favor of the subscription, after due notice of the time and place of the election. The case assumes that the requisite notices were not given of the election, and hence that the vote has not been in conformity with the law.

This view would seem to be decisive against the authority on the part of the board to issue the bonds, were it not for a question that underlies it; and that is, who is to determine whether or not the election has been properly held, and a majority of the votes of the county cast in favor of the subscription? Is it to be determined by the court, in this collateral way, in every suit upon the bond, or coupon attached, or by the board of commissioners, as a duty imposed upon it before making the subscription?

The court is of opinion that the question belonged to this board. The act makes it the duty of the sheriff to give the notices of the election for the day mentioned, and then declares, if a majority of the votes given shall be in favor of the subscription, the county board shall subscribe the stock. The right of the board to act in an execution of the authority is placed upon the fact that a majority of the votes had been cast in favor of the subscription; and to have acted without first ascertaining it, would have been a clear violation of duty; and the ascertainment of the fact was necessarily left to the inquiry and judgment of the board itself, as no other tribunal was provided for the purpose. This board was one, from its organization and general duties, fit and competent to be the depository of the trust thus confided to it. The persons composing it were elected by the county, and it was already invested with the highest functions concerning its general police and fiscal interests.

We do not say that the decision of the board would be conclusive in a direct proceeding to inquire into the facts previously * to the execution of the power, and before the rights and [* 545] interests of third parties had attached; but, after the authority has been executed, the stock subscribed, and the bonds issued, and in the hands of innocent holders, it would be too late, even in a direct proceeding, to call it in question. Much less can it be called in question to the prejudice of a *bona fide* holder of the bonds in this collateral way.

Another answer to this ground of defense is, that the purchaser of the bonds had a right to assume that the vote of the county, which was made a condition to the grant of the power, had been obtained, from the fact of the subscription, by the board, to the stock of the railroad company, and the issuing of the bonds.

The bonds on their face import a compliance with the law under which they were issued. "This bond," we quote, "is issued in

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part payment of a subscription of two hundred thousand dollars, by the said Knox county, to the capital stock, &c., by order of the board of commissioners," in pursuance of the third section of act, &c., passed by the general assembly of the State of Indiana, and approved 15th January, 1849.

The purchaser was not bound to look further for evidence of a compliance with the conditions to the grant of the power. This principle was recently applied in a case in the Court of Exchequer in England. (6 Ellis & Blackburn, p. 327, *The Royal British Bank v. Tarquand*.) It was an action upon a bond against the defendant, as the manager of a joint stock company. The defense was a want of power under the deed of settlement or charter to give the bond. One of the clauses in the charter provided that the directors might borrow money on bonds in such sums as should from time to time by a general resolution of the company be authorized to be borrowed. The resolution passed was considered defective. Jervis, Ch. B., in delivering the judgment of the court, observed: "We may now take it for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement. But they are not bound to do more. And the party

here, on reading the deed of settlement, would find, not [* 546] a prohibition from borrowing, but a permission * to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorizing that which, on the face of the document, appeared to be legitimately done." (See also 5 Ellis and Bl. p. 245, S. C. and 25 E. L. and Eq. p. 114, *Macle v. Sutherland*.) The principle we think sound, and is entirely applicable to the question before us.

A question was made upon the argument, that the suit could not be maintained upon the coupons without the production of the bonds to which they had been attached. But the answer is, that these coupons or warrants for the interest were drawn and executed in a form and mode for the very purpose of separating them from the bond, and thereby dispensing with the necessity of its production at the time of the accruing of each installment of interest, and at the same time to furnish complete evidence of the payment of the interest to the makers of the obligation.

Some other minor points were made in the case upon the argument, which we have considered, but which it is not important should be particularly noticed. We are satisfied the judgment below is right, and should be affirmed.

Commissioners of Knox County v. Wallace.

Mr. Justice DANIEL dissenting.

In the case of the Knox County Commissioners v. Aspinwall *et al.*, it is my opinion, in the first place, that the circuit court had not jurisdiction of the cause, one of the parties being a corporation; and, secondly, I think that the commissioners being known to be a party, it was the duty of those who dealt with them to ascertain the extent of their powers.

BOARD OF COMMISSIONERS OF KNOX COUNTY, Plaintiffs in Error, v.
DAVID C. WALLACE.

21 H. 546.

WRIT of error to the circuit court for the district of Indiana.

The facts and principles of this case are precisely the same as those of the one just preceding.

It was argued by *Mr. Thompson*, for plaintiffs.

Mr. McLean, for defendants.

*Mr. Justice NELSON delivered the opinion of the court. [* 547]

This is a writ of error to the circuit court of the United States for the district of Indiana.

The suit was brought by Wallace against the board, upon several coupons, for installments of interest which had been attached to certain bonds issued by the defendants to the Ohio and Mississippi R. R. Co. The coupons were owned by the plaintiff, and had been duly presented for payment, which was refused. The defendants plead the general issue, and six special pleas, to which there were replications, except the second and sixth pleas, to which there were demurrers.

The court sustained the demurrers. There were afterwards amendments and demurrers to pleadings not very intelligible in the record, and seem not to have been relied on by either party. The case was tried upon the general issue, and the facts disclosed upon the trial were substantially the same, *mutatis mutandis*, as those which were proved or admitted in the previous case of Aspinwall and others against these same defendants. After the evidence was closed, the defendants presented ten prayers to the court, upon each of which instructions were given. It is unnecessary to go through them; the questions involved have already been examined

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in the case above mentioned, and the result there arrived at affirms the judgment in this case.

Judgment affirmed.

Mr. Justice DANIEL dissented.

PHILO CHAMBERLAIN and others, Appellants, v. EBER B. WARD and others.

and

EBER B. WARD and others, Appellants, v. PHILO CHAMBERLAIN and others.

21 H. 548—572.

ADMIRALTY—COLLISION—MUTUAL FAULT.

In a collision between a steamer and a propeller on Lake Erie, the vessels approaching each other from opposite directions, or nearly so, in the night, with fair starlight, it was held—

1. That the propeller was in fault for the want of knowledge and skill of the mate in charge of her.
2. For his persistence in pursuing his course, when he had ample time to avoid the danger by changing.
3. Because the signal light, though sufficient when put up, had been permitted to become dim for want of trimming and other attention.
4. The steamer was also chargeable with fault for want of a look-out or watch. The mate who has other duties, and attends to them, is not such sufficient look-out. The look-out should give his exclusive attention to that business, and should be stationed where he could best see without obstruction by rigging, and without being too much elevated above the water.
5. Also because the mate in charge of the vessel, who discovered the lights of the propeller a mile away, though doubting what it was, did not take suitable steps to avoid a collision, while running at the rate of sixteen miles an hour.
6. The true construction of the act of March 3, 1859, which makes a vessel liable for all the damages arising for want of proper signal lights, does not impair the admiralty rule that where, in case of collision, the other vessel is also in fault, the damages should be divided. The other vessel in such case is not relieved from the consequences of her own wrong by this provision.
7. The result in this case is, that their damages must be equally divided between the owners of the two vessels, as it is a suit *in personam*.

THESE are cross appeals from the decree of the circuit court for the southern district of Ohio, which divided the damages in an admiralty suit between the owners of the steamer Atlantic and propeller Ogdensburgh. The case is very fully stated in the first opinion, as well as an abstract of pleadings and stipulations.

Mr. Stanbery and Mr. Spalding, for Chamberlain and others.

Mr. Newberry and Mr. Swayne, for Ward and others.

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* Mr. Justice CLIFFORD delivered the opinion of the court. [* 553]

This was a suit *in personam*, and comes before the court by appeal from the circuit court of the United States for the southern district of Ohio, sitting in admiralty. It was commenced by the present appellees, as owners of the steamer Atlantic, against the appellants as owners of the propeller Ogdensburgh, and grew out of a collision which occurred on Lake Erie between those vessels on the 20th day of August, 1852, whereby the propeller received damage, and the steamer was run down and lost. Some change was made in the nature * and character of the [* 554] proceeding after the suit was instituted, making it necessary that a brief explanation should be given, in order that the present state of the pleadings may not be misunderstood. According to the transcript, the original libel was filed in the clerk's office of the district court on the 27th day of October, 1852, and on the same day a process of attachment against the propeller, and monition to her owners, was taken out, and was subsequently served, pursuant to its mandate, by attaching the vessel, publishing notice to those interested, and summoning the respondents. On the 11th day of November following, an amended libel was filed in court, setting forth more in detail the circumstances of the collision and the grounds of the claim as made by the libelants. As amended, however, the libel still retained in some of its aspects the form of a proceeding *in rem* against the vessel, and a suit *in personam* against her owners.

In the answer, which was not filed till after the process was served, the appellants, as claimants of the propeller and respondents in this suit, excepted to the form of the libel, alleging that the two modes of proceeding were improperly joined, and prayed that the libel should be dismissed on that account. At the hearing in the district court, the exception of the respondents for a misjoinder was sustained, and thereupon the libelants, on motion for leave, were permitted to amend and change the proceeding to the form of a suit *in personam* against the appellants as owners of the propeller, and the cause was allowed to progress, and in that form of proceeding the parties were ultimately heard upon the merits of the controversy. Another explanation is also necessary, connected with the answer of the respondents, as without it the subsequent proceedings in the cause would appear to have been irregular, and certainly would be incomprehensible. On the 26th day of April, 1853, the parties entered into an agreement to the effect that the answer of the respondents in this suit should operate as a cross-libel for the damage sustained by the propeller, and that the claims

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of both parties to damage should be considered by the court in weighing the evidence, and be adjudicated upon in the [* 555] final decree; and in order to facilitate the * investigation, it was admitted in the case that the damage sustained by the propeller amounted to the sum of three thousand dollars, and that the value of the steamer was seventy-five thousand dollars. Other interlocutory proceedings were had in the cause which it is not important to notice, and testimony was taken on both sides, and at the final hearing on the 10th day of May following a decree was entered, that the libel be dismissed with costs; and under the authority conferred by the agreement that the answer should operate as a cross-libel, it was further ordered, adjudged, and decreed, that the libelants pay to the respondents, within thirty days, the sum of three thousand dollars, with interest, as the damage which the propeller sustained by the collision.

From that decree the libelants appealed to the circuit court. Much additional testimony was taken in the circuit court, and after a full hearing on the 12th of November, 1856, upon the pleadings as modified, and the proofs adduced by the respective parties, it was ordered, adjudged, and decreed, that the decree of the district court be in all things reversed, and a final decree was entered, to the effect that the damages occasioned by the collision, together with the costs in both courts, be equally divided, and that each party bear a moiety of the same; and that the respondents, pursuant to the admissions of the parties as to the amount of the damage, pay to the libelants the sum of thirty-six thousand dollars. Whereupon the parties respectively appealed to this court, and the appeals have been separately docketed in conformity to the agreement of the parties, that the answer of the respondents should operate as a cross-libel for the damage sustained by the propeller.

Some reference to the pleadings touching the merits of the controversy now becomes necessary, before we proceed to the consideration of the matters of fact in dispute between the parties in this suit.

According to the allegations of the libel, the steamer Atlantic was duly enrolled and licensed, and was regularly employed in transporting passengers and freight, making semi-weekly trips each way, to and from Detroit, in the State of Michigan, and Buffalo, in the State of New York. She left Buffalo at [* 556] * the usual hour in the evening of the 19th of August, 1852, with freight and a large number of passengers on board, bound on her regular trip to the port of Detroit. And the libelants allege that she was a tight, strong vessel, and in every

respect well manned, equipped, and appointed for the voyage, with a full complement of officers and men; and that those to whom the duty properly belonged were at the time of the disaster on the lookout for the safety and protection of the vessel. They also allege that after leaving Buffalo she proceeded on her voyage in the usual route across the lake, with all her signal-lights displayed as required by law; that while she was so proceeding, at about half past two o'clock in the morning of the following day, and when she was off Long Point, on the Canada shore, the propeller Ogdensburgh, then being on her way from Cleveland to the entrance of the Welland canal, came upon the steamer, and with great force and violence ran into her, the bow of the propeller striking the larboard side of the steamer near the forward gangway, breaking and crushing by the force and violence of the collision into and through the guard and hull of the vessel, so that she filled with water and sunk, and became wholly lost to the libelants.

Other matters of fact, material to the issue, are also set forth in the libel, and among the number are the following: that the propeller, before and at the time of the collision, did not have burning, and properly displayed, the signal lights required by law; that she was not then proceeding in the usual route from Cleveland to the entrance of the canal, and that those in charge of her when she came in sight of the lights of the steamer neither stopped her engines, nor slackened her speed, nor altered her course, nor took any other precaution to prevent or avoid a collision; and the libelants aver that it was otherwise with those in charge of the steamer; that as soon as they perceived the lights of the propeller approaching, they put the wheel of the steamer first a-port, and then hard a-port, turning her course to the right, away from the propeller, as by law it was their duty to do, and that they made every effort in their power to avoid a collision; and, finally, that the persons in charge of the propeller, though they saw the lights of the *steamer at a great distance, and in ample time to have [*557] prevented the disaster, did not put the wheel of the propeller a-port, or turn their vessel to the right, away from the steamer, as they were bound to do; nor did they stop or slow the engine, or display lawful signal lights, but so negligently, improperly, and unskillfully navigated their vessel that she ran directly and almost at right angles into and against the steamer, and thereby occasioned the disaster. Many of the affirmative facts alleged in the libel are expressly controverted in the answer filed by the respondents. They deny that the steamer was a tight, strong vessel, or that she was well manned and appointed for the voyage;

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and they also deny that the proper persons were on the look-out for the protection and safety of the vessel, or that those in charge of the steamer took any precautionary measures to prevent the collision.

In addition to these denials they allege, as matter of defense, that the propeller, a vessel of three hundred and fifty-three tons burden, left Cleveland on the day preceding the disaster, at about twenty minutes past twelve o'clock, deeply laden, and proceeded on her voyage, by the way of Fairmount, towards Ogdensburgh, her place of destination, which was to be reached through the canal before mentioned; that about two o'clock the next morning, and when she was steering northeast by east, on her proper course to the entrance of the canal, the wind being light and the weather somewhat hazy, the watch on her deck discovered the light of a steamer from two or three points off her larboard bow, which was supposed to be three miles distant; that the propeller kept on her course, running at a speed of about seven miles an hour, until the mate, who had the watch, ascertaining that the light was fast approaching the propeller, gave the signal to slow, which was obeyed; and soon after, on discovering that the light was coming still nearer, signalled to stop; and then, finding that the vessels were likely to come in contact, he directed the engine to be reversed, and gave the order to back; but in spite of all these precautionary measures the collision ensued.

Respecting the immediate cause of the collision, the theory of the respondents is, that the steamer, if she had held her [* 558] * course southwest by west, would have passed the propeller nearly a mile on her starboard quarter; and they accordingly allege, that by putting her helm a-port her course was turned to the right, so as to bring her across the bows of the propeller. And they also allege, in this connection, that the steamer was running with unabated speed, at the rate of fifteen miles an hour, when she fell with all her momentum upon the stem of the propeller, wrenching it out of its place, and carrying the propeller half round as she ran on her course.

And they finally allege that the persons in charge of the propeller, from the moment they first discovered the light of the steamer to the time of the collision, managed their vessel according to the most approved rules of navigation; and that the collision was wholly owing to the fault, neglect, and unskillfulness of the officers and crew of the steamer, in changing her course across the path of the propeller, and in their culpable omission to stop the steamer, after it was found that such change of course increased

the danger by bringing the two vessels closer together. And, in accordance with the theory that the steamer was wholly in fault, they pray that their answer may be taken as a cross-libel in their behalf, to recover the damage sustained by the propeller, and that such sum may be decreed to them, by reason of the collision, as in justice they are entitled to receive.

Such is the substance of the pleadings, so far as respects the circumstances of the collision, and all the matters of fact to be determined by the court.

Since the suit was commenced, the parties have examined more than one hundred witnesses; and their testimony, as exhibited, fills nearly four hundred pages of the transcript. In that state of the case, a particular analysis of the testimony of each witness, and a comparison of their respective statements, will not be attempted, as its effect would be to extend the investigation beyond all reasonable limits, without any practical benefit to either party. All that can be done, under the circumstances, will be to state the material facts proved, and to refer to such brief portions of the evidence as seems to be necessary to confirm our conclusions. Conflicting testimony * we have endeavored to [*559] reconcile, where it was possible; and when not so, we have drawn our conclusions from the weight of the evidence and the probabilities of the case.

With these explanations, we will proceed to state the material facts, so far as respects the steamer Atlantic.

She left Buffalo between nine and ten o'clock in the evening of the day preceding the disaster, having on board, in addition to her freight, nearly five hundred passengers, of whom more than one hundred were lost. At the time of her departure, she was in every respect seaworthy, and was well manned and appointed for the voyage, with a competent master and a sufficient and competent crew. Steamers, on leaving Buffalo for Detroit, usually steer southwest by west; and the Atlantic, following her accustomed route, pursued that general course during the night, until she made Long Point light, on the Canada shore, when the officer in charge of her deck changed her course one-fourth of a point to the southward, in order to give the light a wider berth. When abreast of that light, and about two miles distant from it, the steamer resumed her former course, about southwest by west, and continued on her voyage, without any other change, until the second mate, who had charge of the deck, discovered two white lights three-fourths of a point off her larboard bow, when he ordered the wheelsman to port her helm, and the order was obeyed.

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Nothing additional occurred during the voyage, of any importance in this investigation, up to the time those lights were discovered by the second mate. His watch, which commenced shortly after the steamer was outside, had not then closed, and of course he was properly in charge of the deck. He testifies, that at first he saw only one light, and then another, and that they appeared like glimmering stars, and at first view he was unable to determine whether they were stars or the lights of a vessel; but upon further observation he supposed they were the lights of a sail vessel, and accordingly gave the order to port the helm. That order was given while the officer who issued it was standing in the pilot house, which was situated on the forward part of the hurricane deck, at the usual elevation, in steamers of that description, above the water-line of the vessel. She was a first-class steamer, of eight hundred tons burden, and was moving through the water at the rate of sixteen miles an hour, and the officer in charge of the deck, and who gave the order to port the helm, was the only look-out stationed on any part of the vessel; and it is not pretended that either officer or seamen, other than the officer of the deck, had been assigned to that duty during the voyage.

Two other persons, the wheelsman and a passenger, were in the pilot-house with the second mate, both when he discovered the lights and when he gave the order to port the helm; and the evidence shows that he went there for a purpose connected with his duty as officer of the deck; and he testifies that he had not been inside more than two minutes when he first saw the light. After having given the order to port the helm, he immediately left the position where he had been standing, and went on to the top of the pilot-house, and then he says the signal lights of the Atlantic, which were properly displayed, and were burning brightly, shone on to the approaching vessel, and enabled him to see that she was a steamer, and that the two vessels were very close together. His own account of what followed shows conclusively that the knowledge he then for the first time obtained, as to the character of the approaching vessel, was too late to enable him to adopt the necessary precautions to avoid the impending peril. On seeing the propeller, and ascertaining the danger of his situation, arising from the closeness of her approach, he ordered the helm of the steamer hard a-port, and, without waiting to know whether the order was obeyed, put his hand on to the telegraph, with a view to give the signal to stop; but perceiving that the collision was almost certain, he omitted to signal, concluding that the only chance of

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safety was to rely upon the velocity of the steamer, and the operation of her helm under the order already given, which, it seems was promptly obeyed. Precautionary measures could not then be effectually adopted, as the time and opportunity to render them available had passed, and the two vessels almost immediately came together, the propeller striking the larboard side of the steamer near the forward gangway, crushing through the guard and hull of the steamer, and *otherwise damaging her, so [* 561] that before she had run a mile she filled with water and sunk in the lake. These facts are drawn from the testimony of the witnesses who were on the deck of the steamer or in her pilot-house, and are believed to be substantially correct, and to correspond with the events as they occurred. They all concur in saying that they did not see any signal lights on the propeller as she approached, and supposed she was a sail vessel till it was too late to stop the engine, and affirm most confidently, that if good signal lights had been shown, they would have seen them. Those shown by the steamer were seen by the mate of the propeller when the vessels were three miles apart, and several witnesses testify that such lights, if properly shown, as required by law, could be seen at the distance of four or five miles; and in view of the evidence as to the state of the weather and the character of the night, we have no doubt they might have been seen, if burning brightly, in ample time to have prevented the disaster. All the witnesses agree that the wind was light, and the surface of the lake smooth, and they generally admit that there was some mist or haze on the water; but assert in the most positive terms that it was starlight overhead and no one pretends that it was unusually dark. Good signal lights, under such circumstances, if burning brightly, could readily be seen, notwithstanding the haze on the water, at a sufficient distance to enable steamers approaching each other to adopt every necessary precaution to avoid a collision.

Having stated the principal facts proved, as they appear to the court, so far as respects the steamer, we will now proceed to the examination of those of a corresponding character which relate to the propeller. More difficulty attends this branch of the inquiry on account of the conflicting state of the testimony, and the consequent uncertainty in which the facts are involved. Some of the facts, however, are fully proved, and to those we will first invite attention. As alleged in the answer, the propeller left Cleveland, on the day preceding the disaster, on her downward trip from Chicago to Ogdensburgh, which was to be reached through the Welland canal. No doubt is entertained that she was a good strong vessel,

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[* 562] and there is nothing * in the testimony to call in question either the competency of her master or the sufficiency of her crew. It appears, by the testimony of her master, that she left Cleveland about noon, and ran down opposite Grand river by daylight; that after arriving there she steered, for about an hour, east-northeast, and then turned to northeast by east till the vessels came together. This last statement, however, is obviously mere hearsay, as the watch of the mate commenced at twelve o'clock at night, and he continued in charge of the deck until half-past two in the morning, when the collision occurred; and the master admits, what it is important to observe, that it was usual when they got down off Long Point, and found themselves out of the way, "to steer accordingly," by which we understand him to mean that it was usual, when they got down there, to regulate the course of the propeller with respect to the well-known position of Long Point, and perhaps with a view to make that light, in the further progress of the voyage, which is proved to be the most prominent light on the route. At twelve o'clock the mate took charge of the deck, and he says he kept the propeller on a course of east-northeast until two o'clock, and then hauled her off from the southern shore to northeast by east, and that soon after he saw a light two points or two and a half points off her starboard bow. Could this statement of the mate, in regard to the course of the propeller, be regarded as correct, we should be obliged to acquit both vessels, upon the ground that the alleged collision never took place, as obviously it could not, assuming that the course of the steamer has been correctly ascertained. His testimony in this particular, therefore, must be considered as founded in mistake; and it is proper to remark that he is contradicted in so many particulars, and is proved to have made so many contradictory statements in respect to the circumstances of the collision, that we deem it unsafe to give full credence to his statements, especially in regard to such matters in controversy as obviously involve the vindication of his own conduct in the management of the vessel. Rejecting his statement as incredible, because inconsistent with the admitted and well-established facts in the case, we are left without any satisfactory testimony in the record * from which the precise course of the propeller, for one or two hours before the collision, can be ascertained with any reasonable degree of certainty.

Looking at the other facts and circumstances in the case, there is much reason to conclude that the inexperience and ignorance of the mate led him, in the early part of his watch, to adopt a route somewhat nearer to the southern shore than had been usual, until

he got down off Long Point; and finding, on arriving there, that he was too far to the southward, he then changed the course of the propeller to the one she was pursuing when the lights of the steamer were first discovered; and this view of the case finds support in the fact proved by the master, that it was usual to correct any irregularity in the course at that stage of the voyage. That the propeller was south of the Atlantic when her mate discovered the signal lights of the latter vessel, is proved beyond all reasonable doubt, and is in effect admitted by the mate in that part of his testimony where he says that the bearing of her lights, when he first saw them, was two or two and a half points off the starboard bow of the propeller. Her course then was in an easterly direction, and it is equally well established that her white lights were first seen on the steamer, whose course was westerly, off her larboard bow. Assuming these two facts to be true, of which there is no doubt whatever, and it necessarily follows that the propeller was south of the Atlantic, and such, it is believed, was the real fact. Both vessels were injured by the collision, and additional light is shed upon this inquiry by the evidence in the case as to the localities in the respective vessels where the damage was received. All, or nearly all, the damage received by the propeller was in her starboard bow, near the stem, and it was the larboard side of the steamer, near the forward gangway, that was so crushed and broken in as to cause her to fill with water and sink. These circumstances, taken in connection with the well-established fact that the mate of the propeller, who had charge of her deck, persistently maintained that he had a right to keep his course, and that it was the duty of the steamer to adopt the necessary precautions to keep out of the way, furnish strong grounds of *pre- [* 564] sumption that no considerable change was made by the propeller until the peril was impending and the collision inevitable. Any change of course, if made under such circumstances, whether to the starboard or larboard, would not constitute a compliance with the rules of navigation, because it would be too late to accomplish the purpose for which precautions are enjoined.

Much discussion also took place at the bar upon the question whether the propeller, at the time of the collision, had proper signal lights displayed, as required by law. On that point, the evidence shows that her signal lights were seasonably set and properly displayed at the usual hour, and were burning brightly throughout the early part of the night; and no doubt is entertained that they continued to burn, so as to answer the purpose for which they are required, till after twelve o'clock, when the watch of the mate

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commenced. It is, however, clearly proved that it was usual and necessary to clean and trim them, and perhaps supply them with additional oil, about the middle of the night; and the steward, who was assigned to that service, and whose duty it was to see that it was properly performed, testifies that her signal lights were neglected in that particular on the night of the collision, and, consequently, were burning so dimly when it occurred, that they could not be seen at a distance beyond twice the length of the vessel; and in confirmation of this statement, he says that, shortly after the vessels came in contact, he took down the signal lights of the propeller, by order of the master, and brushed off the crust, from the wicks and trimmed them, and testifies positively that they were dim.

1. Our conclusions upon this state of the evidence will now be briefly stated, commencing with the propeller; and we find that she was in fault, because she did not have a competent and skillful officer in charge of her deck, and because it appears that his want of qualifications and unskillfulness contributed to the collision. Owners of vessels, and especially those who own and employ steamships, whether propellers or side-wheel steamers, must see to it

that the master and other officers intrusted with their [* 565] control and management are skillful and *competent to the discharge of their duties, as, in case of a disaster like the present, both the owners and the vessel are responsible for their acts, and must answer for the consequences of their want of skill and negligence; and this remark is just as applicable to the under officers, whether the mate or second mate, as to the master, during all the time they have charge of the deck. That the mate in this case was substantially without experience in navigating steamers, and utterly destitute of the requisite information to fit him to determine the proper courses of the voyage, are facts so fully proved that it is difficult to regard them as the proper subjects of dispute; and what is more, the master knew his unfitness when he started on the voyage, and stated, before the vessel left Cleveland, to the effect that he was afraid that he was going to be sick, and that he had no confidence in the mate. Some of the owners also distrusted his fitness when they employed him, and made an effort to engage another person in his stead; and one of them, after having heard of the disaster, expressed his regret that the person to whom he first applied had not taken his place. We forbear to pursue this branch of the subject, only remarking, in addition to what has already been stated, that the evidence to establish his unfitness and incompetency for the place is full and conclusive.

2. The propeller is also in fault because she did not have signal lights properly displayed, as required by law; and this conclusion is intended to apply to the entire period after the steamer came in sight, the weight of the testimony tending strongly to show that they were little better than if they had been actually extinguished. At all events, it is satisfactorily shown that they were burning so dimly as not to fulfill the purpose and object for which they are required. There is some conflict in the statements of the witnesses on this point; but the testimony of the steward, whose duty it was to repair them, and who, by the command of the master, attended to the service shortly after the collision, appears to be entitled to belief, and when considered in connection with the positive affirmations of the witnesses for the libelants, that they looked for signal lights on the propeller as she approached, and saw none, seems to be *decisive of the question. Signal lights are [* 566] required by the act of congress, in order that they may be seen by an approaching vessel in season to enable those in charge of her to ascertain and adopt necessary precautions to prevent a collision with the vessel whose lights are so displayed; and when they are extinguished, or burning so dimly as not to fulfill the purpose and object for which they are required, they do not and cannot constitute a compliance with the act of congress.

3. The propeller is also in fault, for the reason that the officer in charge of her deck neglected seasonably and effectually to change the course of the vessel, and persistently kept her on her course after he discovered the signal lights of the steamer, rendering it highly probable that it was this error, no less than the former, which contributed to the collision. Many circumstances tend to show that if he had adopted the usual precaution the disaster might have been avoided. Comment upon this proposition is unnecessary, as in its legal aspect it imputes to the propeller a palpable violation of the rules of navigation, and the theory of fact on which it rests is substantially supported by the testimony of all the witnesses on both vessels, and by no one more fully than by the mate of the propeller, who had charge of her deck. He admits that he saw the signal light of the steamer when she was three miles distant, and he expressly states that the propeller was kept precisely on her course, until he saw the steamer was very near, and then he says he gave the signals to stop and back; and at the same time that he signalled to stop, he told the man at the wheel to put the helm hard a-starboard, and he says the order was obeyed.

Full damages are claimed by the libelants, not only on the ground that the evidence shows that the steamer was without fault, but upon

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the further ground that the propeller, under the circumstances of this case, is made liable by the fifth section of the act of the 3d of March, 1849, for all the loss or damage which the steamer sustained. A brief reference, however, to the provisions referred to, will show that the construction cannot be supported. Steamboats and propellers navigating the lakes are required by that section to

[* 567] carry a triangular *light, shaded green on the starboard side, and red on the larboard side, with reflectors, and to

be of a size to insure a good and sufficient light; and the owners of such vessels neglecting to comply with the regulation are declared liable to the injured party for all loss or damage resulting from such neglect. It is insisted by the libelants that the owners of the propeller, inasmuch as she did not show good and sufficient signal lights, are liable to them in this case, under a proper construction of that provision, for all the damage occasioned to the steamer by the collision. Such is not the language of the section, and we think the construction contended for would be both unwarranted and unreasonable. Owners of the vessels named in that section are made liable for the consequences resulting from their own acts, or from the acts of those intrusted with the control and management of their own vessel, and not for any damage resulting from the misconduct, incompetency, or negligence, of the master or owners of the other vessel. They are made liable for their own neglect, and not for the neglect of the other party. Failure to comply with the regulation, in case a collision ensues, is declared to be a fault, and the offending party is made responsible for all loss or damage resulting from the neglect; but it is not declared by that section, or by any other rule of admiralty law in the jurisprudence of the United States, that the neglect to show signal lights, on the part of one vessel, discharges the other, as they approach, from the obligation to adopt all reasonable and practicable precautions to prevent a collision. Absence of signal lights in cases falling within the act of congress renders the vessel liable to the extent already mentioned, but it does not confer any right upon the other vessel to disregard or violate the rules of navigation, or to neglect any reasonable and practicable precaution to avoid a collision, which the circumstances afford the means and opportunity to adopt. Steamers displaying proper signal lights are in that respect without fault, but they have other duties to perform to prevent collisions, besides complying with that requirement, and their obligation to perform such

other duties remains unaffected by anything contained in [* 568] the provision under consideration. As an *illustration of our views upon the subject, we will suppose the case of

of two steamers approaching on intersecting lines. They are required by the act of congress to show signal lights, in order that each may be seen by the other in time to adopt reasonable and necessary precautions to prevent a disaster like the present; and if one has such lights, and the other has not, yet if the one having such lights actually sees the other vessel as she approaches, in ample season to avoid the collision, and neglects to take any proper precaution to prevent it, and it ensues, it cannot be said in such a case that all the loss or damage resulted from the neglect of the vessel without such lights, as the collision might have been prevented; and, but for the negligence or perverseness of those in charge of the vessel showing lights, would never have occurred. We are not prepared to admit that a fair construction of the section referred to would absolve a party, under such circumstances, from pecuniary responsibility. What the judgment of the court would be in the case supposed it is not necessary to decide, and we only advert to it as an illustration to show that the construction of the act of congress contended for cannot be sustained. All we mean to decide is, that the neglect of the propeller to show signal lights did not vary the obligations of the Atlantic to observe the rules of navigation, and to adopt all such reasonable and necessary precautions to prevent the collision, as the circumstances in which she was placed gave her the opportunity to employ.

1. The Atlantic is also chargeable with fault, because the officer in charge of her deck did not exercise proper vigilance to ascertain the character of the approaching vessel after he discovered the white lights, which subsequently proved to be the white lights of the propeller. His excuse, that he supposed she was a sailing vessel, under the circumstances of the case, as shown in the evidence, is not satisfactory. When he first discovered those lights, the two vessels were at least a mile apart; and if it be true, as he states, that they appeared like glimmering stars, we are satisfied, from the evidence, that the distance must have been much greater, as is evident from the character of the night, and from the fact, which is fully * proved, that the red light of the steamer was seen [* 569] on the propeller at the distance of three miles. Those white lights, though not the signal lights required by the act of Congress, were nevertheless sufficient to apprise the officer on the deck of the steamer that a vessel of some sort was approaching; and if he had performed his duty, the night being calm and the wind light, he might have seasonably ascertained that it was a propeller. They were large globe lamps, such as are usually shown by sail vessels, and were suspended in a similar manner, and the

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weight of the testimony clearly shows that they were burning brightly; and if so, they would hardly appear like glimmering stars at the distance of a mile, on a smooth sea, when at the same time the usual red lights carried by steamers were plainly visible at three times that distance. Two other persons were in the pilot-house with the second mate when he discovered those white lights, one of whom was a master mariner; and although he says they did not hold any conversation, there is much reason to conclude that his estimate of the time he remained there is somewhat short of the fact. Master mariners, as well as other seafaring men, are very apt to converse when they meet on the theatre of their favorite pursuit; and the statement that they remained together in the pilot-house, even for two minutes, without speaking, needs confirmation.

2. In the second place, the *Atlantic* is chargeable with fault, because the officer of her deck did not seasonably and effectually change the course of the vessel, or slow or stop her engine, so as to avoid a collision, after he discovered the white lights of the approaching vessel. Whether his neglect to adopt those precautions, or some one of them, arose from inattention or rashness, is immaterial, as, in either event, it was a culpable omission of duty, plainly required by the rules of navigation in that emergency, and one which the dictate of common prudence, as well as a proper regard for the safety of his passengers, should have prompted him to perform; and the owners of the steamer must answer for the consequences of his negligence. His first order, to port the helm, was not designed to change the course of the vessel to any considerable extent, and only had the effect to open the light of the other vessel half a point.

[*570] * This is admitted, and so is the more important fact that no other change of course was made until he gave the order hard a-port, which his own testimony shows was at the instant of collision, and not until all reasonable expectation of preventing it was gone. Nothing additional was done to avert the disaster; and the officer of the deck admits that the speed of the steamer was not slackened at any time throughout the entire period that elapsed after he saw the white lights of the approaching vessel.

On this ground, we think the steamer was clearly in fault, and that her owners are responsible for the consequences of the negligence or mismanagement of the officer in charge of the deck.

3. In the third place, the *Atlantic* was in fault, because she did not have a vigilant and sufficient look-out. No person, either officer or seaman, was assigned to that duty, except the second mate, who also had charge of the deck and the control and management of

the vessel. According to his testimony, the officer of the deck was not expected to occupy any one particular place on the vessel; but was sometimes on the top of the promenade deck, either on the larboard or starboard side of the vessel—sometimes in the pilot-house, on the hurricane deck—and sometimes on the top of the pilot-house; and, in accordance with this practice, the wheelsman of his watch, who was called by the libelants, testifies that he saw him round on the deck, attending to his duties, during all the time he was at the wheel. Steamers navigating in the thoroughfares of commerce must have constant and vigilant look-outs stationed in proper places on the vessel, and charged with the duty for which look-outs are required, and they must be actually employed in the performance of the duty to which they are assigned. To constitute a compliance with the requirements of law, they must be persons of suitable experience, properly stationed on the vessel, and actually and vigilantly employed in the performance of that duty; and for a failure in either of those particulars, the vessel and her owners are responsible.

Look-outs stationed in positions where the view forward or on the side to which they are assigned is obstructed, either by * the lights, rigging, or spars of the vessel, do not con- [* 571] stitute a compliance with the requirement of the law; and, in general, elevated portions, such as the hurricane deck, are not so favorable situations as those more usually selected on the forward deck, nearer the stem. Persons stationed on the forward deck are less likely to overlook small vessels, deeply laden, and more readily ascertain their exact course and movement. Ocean steamers usually have two look-outs in addition to the officer of the deck, and in general they are stationed one on the larboard and the other on the starboard side of the vessel, as far forward as possible, and during the time they are so engaged they have no other duties to perform; and no reason is perceived why any less precaution should be taken by first-class steamers on the lakes. Their speed is quite as great, and the navigation is no less exposed to the dangers arising from the prevalence of mist and fog, or from the ordinary darkness of the night; and the owners of vessels navigating on those waters are under the same obligations to provide for the safety and security of life and property as attaches to those who are engaged in navigating the seas.

Apply these principles to the present case, and it is obvious that the officer in charge of the Atlantic was not a sufficient look-out. He stood the watch of the master, who was below; and, as the officer of the watch, he had the charge of the deck and the control

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and management of the vessel; and in the midst of his varied duties it is scarcely possible that he could give his undivided attention to the special duty required of look-outs.

Not long before the white lights of the approaching vessel were discovered, he had occasion to go into the pilot-house, to look at the compass; and there is much ground to presume that the disaster is more attributable to that circumstance than any other in the case, except the absence of proper signal lights on the propeller.

We are of the opinion that it is a case of mutual fault, and that the decree of the circuit court, apportioning the damages, was correct.

The decree of the circuit court, therefore, is affirmed, without costs.

[* 572] * Mr. Justice DANIEL and Mr. Justice GRIER dissented.

Mr. Justice DANIEL:

In the case of the *Atlantic* and the *Ogdensburgh*, it is my opinion that the admiralty powers of the United States courts do not embrace such a case.

EBER B. WARD and others, Appellants, v. PHILO CHAMBERLAIN and others.

Mr. Justice CLIFFORD delivered the opinion of the court.

This is an appeal in admiralty from a decree of the circuit court of the United States for the southern district of Ohio. The appellants in this suit were the libelants in the case of *Chamberlain et al. v. Ward et al.*, decided at the present term, and the questions to be determined have respect to the same subject-matter which was in controversy in that case, and came before the court upon the same pleadings and testimony. In that case, *Ward et al.*, as owners of the steamer *Atlantic*, filed their libel in the [* 573] district court against *Chamberlain et al.*, as * owners of the propeller *Ogdensburgh*, to recover the damage sustained by the steamer in a collision which occurred between those vessels on the 20th day of August, 1852, while navigating on the waters of Lake Erie. After the process was served, *Chamberlain et al.* appeared and filed their answer to the libel. In the answer, after setting up several defenses, they alleged, among other things not necessary to be noticed, that the collision was not occasioned by the negligence, inattention, or want of proper care and skill, on the part of the master or crew of the propeller, but wholly through the fault, neglect, and unskillfulness of the master and crew of

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the steamer, and set forth the grounds on which those allegations were based, and prayed that their answer to the libel might also be taken as a cross-libel in their behalf against Ward *et al.*, to recover the damage which the propeller sustained by the collision.

On the twenty-sixth day of April, 1853, the parties entered into an agreement, which is a part of this record, that the answer of the respondents should operate as a cross-libel, and that the claims of both parties should be considered by the court in weighing the evidence, and be adjudicated upon in the final decree. Afterwards, at the final hearing in the district court, on the merits of the case, the libel was dismissed upon the ground that the steamer was wholly in fault; and, under the agreement of the parties that the answer should operate as a cross-libel, a decree was entered in favor of Chamberlain *et al.*, for the amount of the damage occasioned to the propeller. Ward *et al.*, as owners of the Atlantic, appealed to the circuit court, where the decree of the district court dismissing the libel and awarding damages to the propeller, as upon a cross-libel, was in all things reversed. That reversal was made upon the ground that the collision was the result of mutual fault, and that the damages and costs ought to be equally divided. Injuries had been sustained by the propeller to the amount of three thousand dollars, and the agreed value of the steamer at the time of her loss was seventy-five thousand dollars, and accordingly a decree was entered in favor of Ward *et al.* for the sum of thirty-six thousand dollars, together with a moiety of the costs in both courts. From that decree *Chamberlain *et al.* ap- [*574] pealed to this court, and the appeal was regularly docketed, and the case has been heard and decided by the court, upon the libel, answer, and proofs, as exhibited in the transcript. At the same time, Ward *et al.*, the present appellants, also appealed from so much of the decree of the circuit court as found the Atlantic in fault, and directed that the damages should be divided. They appealed as respondents in the cross-libel, and under the agreement before referred to, as sanctioned in the district court, filed a separate copy of the record, and regularly docketed the appeal, as in the case of a cross-libel, the answer in the other record constituting the libel in this case.

We have been thus particular in adverting to these proceedings, in order that the relation which the respective parties bear to this controversy, and the state of the pleadings, may be fully and clearly understood, and for the purpose of remarking that they are unusual, and do not meet the approval of this court, and ought not to be drawn into precedent. Respondents in a pending libel

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have the right, in a proper case, to institute a cross-libel to recover damages against the libelants in the primary suit; but they should file their libel, take out process, and have it served in the usual way; and when that is done, the libelants in the first suit regularly become respondents in the cross-libel, and, as such, they must answer or stand the consequences of default. Regularity in pleading is both convenient and essential in judicial investigations, and such departures from the usual practice as are exhibited in this record ought not to receive countenance. This appeal was taken, and has been prosecuted upon the ground that the circuit court erred in coming to the conclusion that the Atlantic was in fault. That question we have already considered and decided in the other appeal, and the conclusions there stated, and the reasons for them, are applicable to this case. As before remarked, both appeals were taken from the same decree, and the questions presented for the decision of the court are in all respects the same, and depend upon the same testimony. In that case, the court held that the Atlantic was chargeable with fault upon three grounds.

[* 575] * 1. Because the officer in charge of her deck did not exercise proper vigilance to ascertain the character of the approaching vessel after he discovered the white lights, which subsequently proved to be the white lights of the propeller.

2. That she was also in fault because the officer of her deck did not seasonably and effectually change the course of the vessel, or slow or stop her engines, after he discovered those lights, so as to prevent a collision.

3. That she was also in fault because she did not have a vigilant and sufficient look-out.

Our reasons for these conclusions are fully stated in the former case, and need not be repeated. Having already decided that the propeller also was in fault, the necessary result is, that the decision of the circuit court was correct.

The decree of the circuit court, therefore, is affirmed, without costs.

Mr. Justice DANIEL and Mr. Justice GRIER dissented.

See dissent in the preceding case.

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SELDEN F. WHITE, Plaintiff in Error, v. THE VERMONT AND MASSACHUSETTS RAILROAD COMPANY.

21 H. 575.

BONDS NEGOTIABLE PAPER—ELEVENTH SECTION OF THE JUDICIARY ACT.

1. That a bond, though a sealed instrument, which is payable to bearer or holder, or order, is a negotiable instrument, is established by the usage and the decisions of the courts of this country, though otherwise in England.
2. Such a bond, with a blank for a payee, may be filled in with his own name by the last holder, and sued on by him.
3. In such case the eleventh section of the judiciary act concerning suits on contracts held by assignee does not apply, and the holder, having the requisite citizenship, may sue in the federal courts.

WRIT of error to the circuit court for the district of Massachusetts. The facts are stated in the opinion.

Mr. Parker, for plaintiff in error.

Mr. Hutchins, for defendant.

* Mr. Justice NELSON delivered the opinion of the court. [* 576]

This is a writ of error to the circuit court of the United States for the district of Massachusetts.

The suit was brought in the court below by the plaintiff (White) against the company, upon several bonds issued by the same.

The case was presented to the court upon an agreed state of facts, and, among others, that the bonds in question were issued by the company, in regular course, and for a sufficient consideration; and that payment had been demanded and refused. Coupons for the accruing interest, previous to the maturity of the bonds, had been duly paid.

It was further agreed that bonds of this description, issued by the company, were sold in the market, and passed from hand to hand by delivery, at prices varying according to the state of the market; and that those in question were issued at or about their date, to a person a citizen of Massachusetts, and were payable in blank, no payee being inserted; that they came into the hands of the plaintiff through several intervening holders, in regular course; and that he then and since lived in the State of New Hampshire, and, before this suit was brought, filled up the blank by inserting "Selden F. White, or order," the name of plaintiff, without the knowledge or consent of the defendants.

The court ruled that the suit could not be sustained, for want of jurisdiction.

The ground upon which this ruling below is sought to be main-

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tained is, that these bonds were issued to citizens of Massachusetts; and as they could not be regarded as negotiable instruments, or, if negotiable, not payable to bearer, the plaintiff was disabled from suing in the federal court, within the prohibition of the eleventh section of the judiciary act. (15 Pet. R. 125; 2 *ib.* 318; 3 How. 574; 8 *ib.* 441.)

In answer to this ground, we think it quite clear, on looking into the agreed state of facts, in connection with the bonds [* 577] and *the mortgage given to secure their payment, that it was the intention of the company, by issuing the *bonds* in blank, to make them negotiable, and payable to the holder, as bearer, and that the holder might fill up the blank with his own name, or make them payable to himself or bearer, or to order. In other words, the company intended, by the blank, to leave the holder his option as to the form or character of negotiability, without restriction. If the utmost latitude, in this respect, was not intended, why leave the payee in blank when issuing the bonds, or why not fix the limit of negotiability, or negative it altogether? To adopt any other conclusion would seem to us to be unjust to the company, for then the blank would be wholly unmeaning; or if any, a meaning calculated, if not intended, to embarrass the title of the holder.

Assuming, then, that these bonds were intended to be made negotiable, we do not see the difficulty suggested in maintaining the suit in the federal court; for until the plaintiff chose to fill up the blank, he is to be regarded as holding the bonds as bearer, and held them in this character till made payable to himself or order. At that time he was a citizen of New Hampshire, and, therefore, competent to bring the suit in the court below.

As to the negotiability of this class of securities, when shown to be intended that they should possess this character by the form in which issued, and mode of giving them circulation, we think the usage and practice of the companies themselves, and of the capitalists and business men of the country, dealing in them, as well as the repeated decisions or recognition of the principle by courts and judges of the highest respectability, have settled the question. (*Morris Canal Co. v. Fisher*, 1 Stockton, 667, 699; *Delafield v. State of Illinois*, 2 Hill N. Y. 177; 8 Paige Ch. R. 527, S. C.; *Mich. Bank v. N. Y. and N. H. R. R. Co.* 3 Kern R. 625; *Carr v. Le Fevre*, 27 Penn. R. 418; *Craig v. The City of Vicksburg*, 31 Miss. R. 216; *Chester W. Chapin v. The Vt. and Mass. R. R. Co.* decided Sept. 7, 1857, in Sup. C. of Mass.)

Indeed, without conceding to them the quality of negotiability,

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much of the value of these securities in the market, and *as a means of furnishing the funds for the accomplish- [* 578] ment of many of the greatest and most useful enterprises of the day, would be impaired. Within the last few years, large masses of them have gone into general circulation, and in which capitalists have invested their money; and it is not too much to say, that a great share of the confidence they have acquired, as a desirable security for investment, is attributable to this negotiable quality, as well on account of the facility of passing from hand to hand, as the protection afforded to the *bona fide* holder.

It is true that in England the law is, that a bond delivered in blank, as it respects the payee, is void, and the blank incapable of being filled up by the holder, either upon an implied or express parol authority from the maker. This is maintained upon the principle that the authority of an agent to make a deed for another must be by deed; and, also, that to admit the parol authority to fill up the blank would, in effect, make a bond transferable and negotiable, like a bill of exchange or exchequer bill. (*Hibble White v. McMorine*, 6 Mees. and Welsb. p. 200; and *Enthoven v. Hoyle et al.*, in the Exch. 9 Eng. L. and Eq. R. 434.)

The law had been otherwise held by Lord Mansfield, in the case of *Texira v. Evans*, cited in *Masten v. Miller*, (1 Anstruther, 228;) but was distinctly overruled by Park, B., in delivering the opinion of the court in the case first above cited, and the opinion reaffirmed by him still more strongly in the second case.

Courts of the highest authority in this country have followed Lord Mansfield, and have not hesitated to meet the fears expressed by Park, B., (that the effect would be to make bonds negotiable,) by admitting the consequence. Chief Justice Marshall, in the case of the *United States v. Nelson & Myers*, (2 Brock. R. 64,) hesitated to reach this conclusion, but expressed a strong belief that, at some future day, it would be by this court.

We think, for the reasons above given, the ruling of the court below cannot be upheld, and that the judgment should be reversed, with a *venire de novo*, &c.

JOHN M. WALKER, Appellant, v. JONATHAN B. H. SMITH.

21 H. 579.

INJUNCTION AGAINST LAND OFFICERS.

Under the act of congress of August 31, 1852, (10 U. S. Statutes, 143,) authorizing the issue of land scrip to the holders of outstanding military land warrants, the secretary of the interior is to determine who is entitled to its benefit: and the courts

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cannot interfere with him in the discharge of that duty, by injunction, on the ground that he is about to issue scrip to one person for which another person has a better right.

APPEAL from the circuit court for the District of Columbia. The facts are sufficiently stated in the opinion.

Mr. Chilton and Mr. Davidge, for appellant.

Mr. Carlisle and Mr. Badger, for appellee.

[* 579] * Mr. Justice GRIER delivered the opinion of the court.

The purpose of this bill is to obtain an injunction to prevent the issuing of certain scrip to appellee by the land office, and to have canceled the assignment under which the appellee had, by the officers of government, been adjudged entitled to the scrip.

This bill was properly dismissed by the court below, as a brief statement of the case will show. The act of congress of 3d March, 1835, made a further and apparently final appropriation of six hundred and fifty thousand acres, to be applied to the satisfaction of Virginia military land warrants. It provided that "no scrip should be issued thereon until the 1st of September following, and that warrants should be received in the general land office till that day; and immediately thereafter, if the amount filed ex-

[* 580] ceeded six hundred and fifty thousand * acres, the commissioner of the land office should apportion the said six hundred and fifty thousand among the warrants which shall then be on file, *in full satisfaction thereof*."

This appropriation was sufficient to pay ninety per cent. of the warrants received.

William S. Scott, as attorney for the heirs of General Charles Lee, filed a warrant in their names for fifteen thousand acres; which was surrendered and satisfied by the issue of land scrip for thirteen thousand five hundred acres, being ten per cent., or one thousand five hundred acres less than the whole amount called for on the face of the warrants.

The warrants were therefore fully satisfied; and, being surrendered, were no longer evidence of any right of property. But it seems that, notwithstanding this surrender and satisfaction, there was a sort of lingering hope or expectation that some time hereafter, congress, by continued importunity, might be prevailed upon to make some further grant of land to satisfy the shadow of equity which was supposed to remain, after the warrantees had surrendered their warrants and accepted the satisfaction tendered.

On the 30th March, 1837, Scott signed an instrument in form of

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a power of attorney, which, after reciting that he had sold to Walker, the complainant, the warrants, and delivered him the scrip issued in lieu thereof, stated as follows: "Now, the object of this power of attorney is to secure the said Walker the said ten per cent. of warrants unsatisfied, or any and every equivalent that may be at any time given in lieu thereof," &c.

On the 18th of January, 1838, Scott conveys by indenture, in consideration of seven hundred and fifty dollars, and with warranty, the Lee warrants, on which he alleges there is "still due one thousand five hundred acres" to defendant. At this time the records of the land office contained no evidence of the prior assignment (if such it can be called) to Walker; and a clerk in the office endorsed on the respondent's deed as follows: "William S. Scott, the party grantor of the within, has full authority on file to sell the warrants and appoint a substitute; and in the event congress makes up the *ten per cent.*, the scrip to be issued will be delivered to Mr. Smith."

*Thus the matter stood for fourteen years, when at [*581] length, on the 31st of August, 1852, congress passed an act, which authorized an issue of land scrip in favor of the *present proprietors* of any outstanding military land warrants, &c. This scrip is to be issued by the secretary of the interior, who is to make the necessary inquiries, and "be satisfied by a revision of the proof, or by additional testimony," &c.

It seems that this act has been construed to include not only unsatisfied warrants, but the ten per cent. not given on the satisfied and surrendered warrants. It is a liberal construction of the statute, and so far as it extends to the scrip in question, it is a simple gratuity. The secretary is made the agent for its distribution. It is his duty to ascertain the parties *entitled* to it, if any person can be said to have a title to a gift before it is received. When he issues the scrip, it then becomes a "chose in action," capable of being dealt with as property by courts of justice, but not till then. The question as to who may be considered as the "*present proprietor*" of these surrendered and satisfied warrants, must be decided by him in the first instance by the rules, customs, and practice of the land office. Before the act of congress, this right was too subtle (being no more than the remote expectation of a gift) to be dealt with by courts, and the act of congress has not conferred on them the distribution of their bounty. Besides, if an injunction was issued to hinder the defendant from receiving the scrip which the land office has concluded to give him, this would confer no title on the complainant.

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Whether, after the land office have issued the scrip to a claimant, another person alleging fraud or misrepresentation, and claiming himself to be the "proprietor" intended by the act, might not obtain the interference of the courts, to obtain a transfer of the scrip to himself, is a question not presented in this case.

But assuming that the court would undertake to decide as to the respective right of these claimants, treating their claims as tangible equities, the complainant has not made out such a case as would entitle him to relief. His power of attorney (or whatever it may be called) mentions no consideration paid. [*582] *The answer of defendants, which is responsive to the bill, (which avers a purchase at market price,) denies the payment of any consideration whatever, and none has been proved. The defendant has paid a large and valuable consideration without any notice of the plaintiff's claim, has made his proofs, has had the decision of the land office in his favor. He has obtained an advantage of which a court of equity will not deprive him under the circumstances.

The judgment of the court below is affirmed with cost.

HIRAM BARBER, Appellant, v. HULDAH A. BARBER, by her next friend, GEORGE CRONKHITE.

21 H. 582.

JURISDICTION AS TO CITIZENSHIP—DIVORCE AND ALIMONY.

1. This court disclaims all jurisdiction in the federal courts to grant divorces or allow alimony; but where a valid decree for alimony has been made in a divorce suit in a State court, the federal court may, under proper circumstances, enforce the rights to the alimony thus decreed.
2. A woman who is divorced *a mensa et thoro* may maintain a suit in chancery against her husband, and it should be brought by her next friend.
3. Where the husband, after such a divorce, removes to and becomes a citizen of another State, leaving his wife behind, her domicile and citizenship remain where she is, and do not follow the husband.
4. Hence she can, by her next friend, bring a suit in the federal court of the State where he resides to enforce, on its equity side, the payment of the alimony which he was ordered to pay her in the divorce suit.
5. A decree of divorce *a vinculo*, obtained by the husband in the State court of his new residence, cannot deprive the wife of her right to alimony under the former decree.

APPEAL from the district court of the United States for the district of Wisconsin. The facts of the case are very fully stated in the opinion.

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Mr. Doolittle and Mr. Billinghamurst, for appellant.

Mr. Brown, for appellee.

* Mr. Justice WAYNE delivered the opinion of the court. [* 583]

We regard this as a suit for a wife brought on the equity side of the district court of the United States for the district of Wisconsin, by her next friend, George Cronkhite, a citizen of the State of New York, against Hiram Barber, a citizen of the State of Wisconsin, to give the same validity to a judgment

* in that State which it has in the State of New York [* 584] against the defendant for the payment of alimony to his wife, who has been divorced from him *a mensa et thoro*, with an allowance of alimony by a court, which had, when the decree was made, jurisdiction over the parties and the subject-matter.

We shall not have occasion to comment upon the relations of husband and wife in their uninterrupted coverture, nor will we discuss the general rights, obligations, or disabilities, of either when they have been separated by a divorce *a mensa et thoro*.

Our first remark is—and we wish it to be remembered—that this is not a suit asking the court for the allowance of alimony. That has been done by a court of competent jurisdiction. The court in Wisconsin was asked to interfere to prevent that decree from being defeated by fraud.

We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery or as an incident to divorce *a vinculo*, or to one from bed and board.

The record raises these inquiries: Whether a wife divorced *a mensa et thoro* can acquire another domiciliation in a State of this Union different from that of her husband, to entitle her, by her next friend, to sue him in a court of the United States having equity jurisdiction, to recover from him alimony due, and which he refuses to make any arrangement to pay; and whether a court of equity is not a proper tribunal for a remedy in such a case.

We will first direct our attention to the circumstances of the case, and will give them from the bill and answer, and from the testimony in the record.

Hiram Barber and Huldah Adeline Barber were married in the State of New York, in the year 1840, where his domicile then was, and continued to be until he left it for Wisconsin, which was soon after a decree had been given for a divorce *a mensa et thoro* between them, with an allowance of alimony to be paid by him. Her application for such a divorce was made by Cronkhite, her next friend, in

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[* 585] the court of chancery for * the fourth district of the State of New York, that court having jurisdiction of the subject-matter and over the parties.

The defendant appeared and resisted the application. The cause was heard on the pleadings and proofs. It resulted in a declaration by the chancellor that the defendant had been guilty of cruel and inhuman treatment of his wife, and of such conduct towards her as to render it unsafe and improper for her to cohabit with him; and that he had abandoned, neglected, and refused to provide for her. And it therefore decreed that the complainant and defendant be separated from bed and board forever; provided, however, that they might at any time thereafter, by their joint petition, apply to the court to have the decree modified or discharged; and that neither of the said parties shall be at liberty to marry any other person during the lifetime of the other party. The court then referred the cause to a master, to ascertain and report what should be allowed and to be paid by the defendant, or out of his estate, to Mrs. Barber, for her suitable support and maintenance. In pursuance of this decretal order and reference, the master made a report. The defendant filed exceptions to it. The cause was regularly brought to a hearing upon the defendant's exceptions. They were overruled, and a final decree was made in the cause. The language of the decree is, that the exceptions are overruled, and that the report of the master is absolutely confirmed. That for the suitable support and maintenance of Mrs. Barber, there should be allowed and paid to her by the defendant, or out of his estate, in quarterly installments, the annual sum of three hundred and sixty dollars in each and every year; and that as it appeared he had not given to her any support in the interval between the filing of the bill in her behalf and the rendition of the decree, that the defendant should pay to her three hundred and sixty dollars a year in quarterly payments from the 1st day of July, 1844, that being the day when the bill was filed; and it was decreed that the sum of nine hundred and sixty dollars, being the alimony retrospectively due, should be paid forthwith by the defendant, and that the complainant should have execution therefor. It was further ordered, that the per-

manent alimony allowed and to become due after the [* 586] * 1st of March, 1847, to which day alimony is above computed, should be paid by the defendant in quarterly payments on the 1st days of March, June, September, and December, in each year during the life of Mrs. Barber; and in case of its not being so paid, that the quarterly payments should bear interest as they respectively became due, and that execution might issue there-

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for *toties quoties*. The court then decreed that the permanent alimony allowed to Mrs. Barber, was vested in her for her own and separate use, and as her own and separate estate, with full power to invest the same in a trustee or trustees, as she might think proper to appoint, with the power to dispose of the same by will or otherwise, from time to time during her life, or at her death, or either, as she may think proper, free from any control, claim, or interposition of the defendant. The said decree, with a taxed bill of costs in the suit, was signed and enrolled according to the form of the statute in such cases made and provided in the State of New York.

It is upon a transcript of all the papers in that suit, authenticated as the law requires it to be done, that the suit now before us was brought in the district court of the United States for the district of Wisconsin.

The complainants aver in their bill that they are citizens of the State of New York, and that the defendant is a citizen of the State of Wisconsin. They then set out the proceedings of the court in New York, divorcing Mr. and Mrs. Barber from bed and board, with especial reference to the decree and the entire record of that suit, charging the defendant with not having paid any part of the alimony adjudged to Mrs. Barber; and that there was then due to her on that account the sum of four thousand two hundred and forty-two dollars and fifteen cents, with interest at seven per cent., that being the legal rate in the State of New York. The rest of the bill it is not necessary to state more particularly, than that it is a recital of a suit which had been brought upon the common-law side of the district court of the United States for the county of Milwaukee, in the territory of Wisconsin, for the amount of alimony due by the defendant; to the declaration in which he filed a demurrer, upon which a judgment was rendered in

* his favor, which was afterwards affirmed in the supreme [*587] court of the State, for the reason that the remedy for the recovery of alimony was in a court of chancery, and not at law. To this bill also the defendant demurred, on account of the case not being within the ordinary jurisdiction of a court of chancery, that the relief sought could only be had in the court of chancery in the State of New York, and that it did not appear that the complainants had exhausted the remedy which they had in New York. This demurrer was overruled, and the defendant was ordered to answer. He did so. He admits in his answer the legality and locality of his marriage with Mrs. Barber; the jurisdiction of the court in the divorce case; that a divorce had been decreed between them

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from bed and board, after contestation; and that by that decree he was subjected to the payment of alimony to the extent and in the way it is claimed in the bill he was then answering. He admits that he left the State of New York without having paid any part of it, or having made any arrangement to do so; alleging, however, that he had left real estate in New York, upon which no proceedings had been taken to make it liable to the decree against him for alimony. And he then goes on to state, that on the 19th day of April, 1852, he had filed his bill in the circuit court of the county of Dodge, in the State of Wisconsin, against Mrs. Barber, she then being his wife, to obtain a dissolution of the marriage contract between them, and that their marriage had been dissolved by a decree of that court, which is on record in the same. And he adds, that his wife by that decree became a *feme sole*; and being so, she could not sue by her next friend, and that her remedy was in a court of law. To this answer a general replication was filed. The cause was carried to a hearing upon the pleadings and proofs, and a decree was made, adjudging that five thousand nine hundred and thirty-six dollars and eighty cents is due from the defendant upon the alimony sued for, for principal and interest, to and prior to the time of filing the bill in this cause, and that the defendant should pay it, for the sole and separate support and maintenance of Mrs. Barber, together with the costs, to be taxed within ten days; and in default thereof, that execution should issue for the same.

[* 588] * It appears, from the testimony in the cause, that the defendant left the State of New York in a short time after the decree for the divorce and for alimony had been rendered, for the purpose of placing himself beyond the jurisdiction of the court which could enforce it, without having paid any part of the alimony due, or leaving any estate of any kind out of which it could be paid; for he gave no proof of any kind that he had real estate in the State of New York in support of that allegation in his answer.

It also appears, from the record, that the defendant had made his application to the court in Wisconsin for a divorce *a vinculo* from Mrs. Barber, without having disclosed to that court any of the circumstances of the divorce case in New York; and that, contrary to the truth, verified by that record, he asks for the divorce on account of his wife having willfully abandoned him. It is not necessary for us to pass any opinion upon the legality of the decree, or upon its operation there or elsewhere to dissolve the *vinculum* of the marriage between the defendant and Mrs. Barber. It certainly has no effect to release the defendant there and everywhere else from his liability to the decree made against him in the State of New

York, upon that decree being carried into judgment in a court of another State of this Union, or in a court of the United States, where the defendant may be found, or where he may have acquired a new domicile different from that which he had in New York when the decree was made there against him.

The questions made by the bill and the answer, and by the arguments of counsel, we will state in the form of an inquiry. They are as follows: Whether a wife divorced *a mensa et thoro* may not have a domiciliation in a State of this Union different from that of her husband in another State, to enable her to sue him there by her next friend, in equity, in a court of the United States, to carry into judgment a decree which has been made against him for alimony by a court having jurisdiction of the parties and the subject-matter of divorce?

In the consideration of these questions, we must not allow ourselves to be misled by the general rule which prevails in England, that a suit cannot be maintained at law by a *feme covert*, and that, notwithstanding a divorce *a mensa et thoro*, a wife cannot sue or be sued in a court of law; for in England she may in several cases maintain a suit in her own name as a *feme sole*, both at law and in equity. They are exceptions to the general rule, or *privileged cases*, under certain circumstances, where it cannot be presumed, from his own acts, that the husband's control of his wife is continued, and where she has been deprived of his protection to represent with her her rights and interests in a suit at law, or in one in equity. The cases mentioned in the books where a *feme covert* may sue as a *feme sole* are: When her husband is banished, or has abjured the realm, or has been transported for felony; where the husband is an alien enemy, and his wife is domiciled in the realm; where the husband is an alien domiciled abroad, and has never been in the realm; or where he has voluntarily abandoned her, and is under a disability to return; so where the husband has deserted the wife in a foreign country, and she goes to England and maintains herself as a *feme sole*; where the husband, in a foreign State, compels his wife to leave him for another political jurisdiction, and she maintains herself there as a *feme sole*.

Cases have been decided in Massachusetts in conformity with the English cases. There are cases in England which have gone much further, but we do not cite them, preferring only to mention such instances as have not been questioned by subsequent cases in England or in the United States. (See Story's Equity Pleading, 6th edition, sec. 61, pp. 59, 60, and the cases cited in the notes.)

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Except in such cases, a *feme covert* cannot sue at law, unless it be jointly with her husband, for she is deemed to be under the protection of her husband, and a suit respecting her rights must be with the assent and co-operation of her husband. (Mitf. Equity Pl. by Jeremy, 28; Edwards on Parties in Equity, 144, 153; Calvert on Parties, ch. 3, sec. 21, pp. 265, 274; 6 How.)

In the case of *Burr v. Heath*, (6 How. S. C. R. 228,) this court said, without any reference to the law of Louisiana: "That the general rule was, when the wife complains of her husband and [* 590] asks relief against him, she must use the name *of some other person in prosecuting the suit; but where the acts of the husband are not complained of, he would seem to be the most suitable person to unite with her in the suit. This is a matter of practice within the discretion of the court. It is sanctioned in Story's Equity Pleading, and by Fonblanque. The modern practice in England has adopted a different course, by uniting the name of the wife with a person other than her husband in certain cases."

There are also exceptions in equity, which are wholly unknown at law. Thus, if a married woman claims some right in opposition to the rights claimed by the husband, and it becomes proper to vindicate her rights against her husband, she cannot maintain a suit against him at law; but in equity she may do so, and against all others who may be proper or necessary parties. But it must be done under the protection of some other person who acts as her next friend, and the bill is accordingly exhibited in her name by such next friend. (Story's Equity Pl. 6th ed. sec. 61, p. 61.) It is also said, in the same work, to be our constant experience, that the husband may sue the wife, or the wife the husband, in equity, notwithstanding neither of them can sue the other at law. (*Cannel v. Buckle*, 2 P. Will. 243, 244; *Ex parte Strangeways*, 3 Ark. 478; *Fonblanque Eq. B. 1*, ch. 2, sec. 6, note N; *Brooks v. Brooks*, Pre. Ch. 24; *Mitford Pl. by Jeremy*, 28.) These citations have been made to show the large jurisdiction which a court of equity has to secure the rights of married women, when it may be necessary to exert it with the assistance of the husband, or when he improperly interferes with them, so as to make it necessary for the wife to defend herself against his unwarranted claims to her property. The result of that jurisdiction now is, that the wife may, in all such instances, sue her husband by her next friend.

There is, too, another ground of jurisdiction in equity, just as certainly established as that is of which we have just spoken. It comprehends the case before us. It is, that courts of equity will

interfere to compel the payment of alimony which has been decreed to a wife by the ecclesiastical court in England. Such a jurisdiction is ancient there, and the principal reason * for [* 591] its exercise is equally applicable to the courts of equity in the United States. It is, that when a court of competent jurisdiction over the subject-matter and the parties decrees a divorce, and alimony to the wife as its incident, and is unable of itself to enforce the decree summarily upon the husband, that courts of equity will interfere to prevent the decree from being defeated by fraud. The inference, however, is limited to cases in which alimony has been decreed; then only to the extent of what is due, and always to cases in which no appeal is pending from the decree for the divorce or for alimony. (*Shaftoe v. Shaftoe*, 7 Vesey, 171; *Dawson v. Dawson*, 7 Ves. 173; *Haffey v. Haffey*, 14 Ves. 261; *Angier v. Angier*, Pre. Ch. 497; *Cooper's Eq. P. ch. 3*, pp. 149, 150; *Coglan v. Coglan*, 1 Ves. p. 194; *Street v. Street*, 1 Turn. and Tapel, 322.)

The parties to a cause for a divorce and for alimony are as much bound by a decree for both, which has been given by one of our State courts having jurisdiction of the subject-matter and over the parties, as the same parties would be if the decree had been given in the ecclesiastical court of England. The decree in both is a judgment of record, and will be received as such by other courts. And such a judgment or decree, rendered in any State of the United States, the court having jurisdiction, will be carried into judgment in any other State, to have there the same binding force that it has in the State in which it was originally given. For such a purpose, both the equity courts of the United States and the same courts of the States have jurisdiction.

We observe, in confirmation of what has just been said, that the jurisdiction of the courts of the United States is derived from the constitution, and from legislation in conformity with it. The first limitation by the latter upon the jurisdiction of the equity courts of the United States is, that no suit can be sustained in them, where a plain, adequate, and complete remedy may be had at law. The court has said: "It is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficacious to the ends of justice, and its prompt administration, as the remedy in equity. (*Boyce's Ex'x v. Grundy*, 3 Peters, 210; *United States v. Rowland*, 4 [* 592] Wh. 108; *Osborn and the United States Bank*, 9 Wh. 841, 842.) It is no objection to equity jurisdiction in the courts of the United States, that there is a remedy under the local law, for the equity jurisdiction of the federal courts is the same in all of

the States, and is not affected by the existence or non-existence of an equity jurisdiction in the State tribunals. It is the same in nature and extent as the jurisdiction of England, whence it is derived." (Livingstone v. Story, 9 Peters, 632.) Such a suit for the enforcement of a decree for alimony as that before us is not an exception, unless the court has not jurisdiction over the parties, and the amount be not such as is required to bring it into this court by appeal.

We proceed to show that it has jurisdiction. The constitution requires, to give the courts of the United States jurisdiction, that the litigants to a suit should "be citizens of different States." The objection in this case is, that the complainant does not stand in that relation to her husband, the defendant; in other words, it is a denial of a wife's right, who has been divorced *a mensa et thoro*, to acquire for herself a domiciliation in a State of this Union different from that of her husband in another State, to entitle her to sue him there by her next friend, in a court of the United States having equity jurisdiction, to recover from him alimony which he has been adjudged to pay to her by a court which had jurisdiction over the parties and the subject-matter of divorce, where the decree was rendered.

We have already shown, by many authorities, that courts of equity have a jurisdiction to interfere to enforce a decree for alimony, and by cases decided by this court; that the jurisdiction of the courts of equity of the United States is the same as that of England, whence it is derived. On that score, alone, the jurisdiction of the court in the case before us cannot be successfully denied.

But it was urged by the learned counsel who argued this cause for the defendant, that husband and wife, although allowed to live separately under a decree of separation *a mensa et thoro*, made by a

State court having competent jurisdiction, are still so far [* 593] one person, while the married relation continues * to exist,

that they cannot become at the same time citizens of different States, within the meaning of the federal constitution, and therefore the court below had no jurisdiction. It was also said, for the purpose of bringing suits for divorces, they may acquire separate residences in fact; but this is an exception founded in necessity only, and that the legal domicile of the wife, until the marriage be dissolved, is the domicile of the husband, and is changed with a change of his domicile.

Such, however, are not the views which have been taken in Europe generally, by its jurists, of the domicile of a wife divorced

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a mensa et thoro. They are contrary, too, to the generally-received doctrine in England and the United States upon the point.

In England it has been decided, that where the husband and wife are living apart, under a judicial sentence of separation, that the domicile of the husband is not the domicile of the wife. (English Law and Equity Reports, 9 vol. 598; 2 Robertson, 545.) When Mr. Phillimore wrote his treatise upon the law of domicile, he said he was not aware of any decided case upon the question of the domicile of a wife divorced *a mensa et thoro*, but there can be little doubt, that in England, as in France, it would not be that of her husband, but the one chosen for herself after the divorce. In support of his opinion, he cites Pothier's *Introd. aux Coutume*, p. 4; Mercadé in his *Commentary upon the French Code*, vol. 1, p. 287; the French Code, tit. 111, art. 108; the *Code Civile of Sardinia*; and Cocher's *Argument in the Duchess of Holsten's case*, *Ouvres*, 1, 2, p. 223.

Mr. Bishop, in his *Commentaries on the Law of Marriage and Divorce*, has a passage so appropriate to the point we are discussing, that we will extract it entire. It is of the more value, too, because it comprehends the opinions entertained by eminent American jurists and judges in respect to the domicile of a wife divorced *a mensa et thoro*. He says, in discussing the jurisdiction of courts where parties sought a divorce abroad for causes which would have been insufficient at home, that "it was necessary to settle a preliminary question, namely, whether for the purpose of a divorce suit the husband and wife can have separate domiciles; that the general doctrine is familiar, that * the domicile of the wife [* 594] is that of her husband. But it will probably be found, on examination, that the doctrine rests upon the legal duty of the wife to follow and dwell with the husband wherever he goes.

"If he commits an offense which entitles her to have the marriage dissolved, she is not only discharged thereby immediately, and without a judicial determination of the question, from her duty to follow and dwell with him, but she must abandon him, or the cohabitation will amount to a condonation, and bar her claim to the remedy. In other words, she must establish a domicile of her own, separate from her husband, though it may be, or not, in the same judicial locality as his. Courts, however, may decline to recognize such domicile in a collateral proceeding—that is, a proceeding other than a suit for a divorce. But where the wife is plaintiff in a divorce suit, it is the burden of her application, that she is entitled, through the misconduct of her husband, to a separate domicile. So when parties are already living under a judicial separation, the domicile of the wife does not follow that of the husband." (Section 728.)

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Chief Justice Shaw says, in *Harlean v. Harlean*, (14 Peck, 181, 185,) the law will recognize a wife as having a separate existence and separate interests and separate rights, in those cases where the express object of all proceedings is to show that the relation itself ought to be dissolved, or *so modified* as to establish separate interests, and especially a separate domicile and home. Otherwise the parties, in this respect, would stand upon a very unequal footing, it being in the power of the husband to change his domicile at will, but not in that of the wife.

The cases which were cited against the right of a wife, divorced from bed and board, to choose for herself a domicile, do not apply. (*Donegal v. Donegal*, in 1 Addam's Ecclesiastical Rep. pp. 8, 19.) That of *Shachell v. Shachell*, cited in *Whitcomb v. Whitcomb*, (9 Curtteis Ecclesiastical Rep. p. 352,) are decisions upon the domicile of the wife, when living apart from her husband by *their mutual agreement*, but not under decrees divorcing the wife from the bed and board of the husband. The leading case under [* 595] the same circumstances is that *of *Warrender v. Warrender*, (9 Bligh. 103, 104.) In that case, Lord Brougham makes the fact that the husband and wife were living apart by agreement, and not by a sentence of divorce, the foundation of the judgment. The general rule is, that a voluntary separation will not give to the wife a different domiciliation in law from that of her husband. But if the husband, as is the fact in this case, abandons their domicile and his wife, to get rid of all those conjugal obligations which the marriage relation imposes upon him, neither giving to her the necessities nor the comforts suitable to their condition and his fortune, and relinquishes altogether his marital control and protection, he yields up that power and authority over her which alone makes his domicile hers, and places her in a situation to sue him for a divorce *a mensa et thoro*, and to ask the court having jurisdiction of her suit to allow her from her husband's means, by way of alimony, a suitable maintenance and support. When that has been done, it becomes a judicial debt of record against the husband, which may be enforced by execution or attachment against his person, issuing from the court which gave the decree; and when that cannot be done on account of the husband having left or fled from that jurisdiction to another, where the process of that court cannot reach him, the wife, by her next friend, may sue him wherever he may be found, or where he shall have acquired a new domicile, for the purpose of recovering the alimony due to her, or to *carry the decree into a judgment there with the same effect that it has in the State in which the decree was given.* Alimony

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decreed to a wife in a divorce of separation from bed and board is as much a debt of record, until the decree has been recalled, as any other judgment for money is. When it is not paid, the wife can sue her husband for it in a court of equity, as an incident of that condition which gave to her the right to sue him, by her next friend, for a divorce.

It was decided in the State of Massachusetts, as early as the year 1800, that there were circumstances under which it appears to be absolutely necessary for the wife to sue, as *for the recovery of alimony*. That case was the same, in its circumstances, as this with which we are dealing. The wife libeled *for a [* 596] divorce *a mensa et thoro*, on account of the extreme cruelty of her husband. The divorce was decreed; and the husband was ordered to pay to her alimony, in quarterly installments. The wife afterwards brought an action against him for arrears. He demurred to the declaration; and judgment was given for her. (*Wheeler v. Wheeler*, 2 Dana, H. 310.)

The same has been held in other cases in that State. It is now established doctrine there, and in some of our other States. They hold that a decree for a divorce, with an allowance for alimony, is as much a judgment as if it had been obtained on the common-law side of the court.

Rogers, justice, in *Clark v. Clark*, (6 Watts and Sergeant,) places the right to recover arrears of alimony on the ground that the husband, after the decree for a divorce was rendered, had withdrawn himself from the jurisdiction of the court, to prevent him from being forced by attachment to pay the alimony which had been decreed to the wife.

In the State of New York, a wife may file a bill against her husband for alimony; and it appearing that he had abandoned her without any support, and threatened to leave the State, the court, on the wife's petition, granted a writ of *ne exeat respublica* against him. (*Denton v. Denton*, 1 J. C. 2, 364.)

In South Carolina, where the court, having no power to grant divorces, decreed to a wife alimony, on her bill praying for that remedy only, and ordered the husband to give security for its payment, the sheriff, having taken him into custody, suffered him to escape; it was held that the wife might maintain, by her next friend, an action at law against the sheriff for the escape. Smith, justice, said: "It had been urged in the argument that this woman, being a *feme covert*, could not maintain the action by her next friend. If that argument were to prevail, there would be a failure of justice, which our law abhors, as there would be no

means of enforcing a decree of a wife against her husband for alimony. The court of equity could not order a refractory husband to be attached, and the sheriff would let him go, if he thought proper; then, if the wife could not sue by her next friend, who could? The law provides no other course. And, upon [* 597] this occasion, I would adopt the course * of a very learned judge, 'if there is no precedent, I will make one.'"

In Ohio, a wife divorced *a mensa et thoro* may maintain ejectment for a lot of land, the use of which was allowed to her as alimony. In Virginia, it was said, in *Purcell v. Purcell*, (4 Hen. and Mansf. 507,) that the court of chancery has jurisdiction in all cases of alimony. In Maryland, the high court of chancery, from the earliest colonial times, exercised the jurisdiction to decree alimony, but not to grant divorces.

This was done under the belief that it belonged to the high court of chancery, in the absence of ecclesiastical tribunals; and in 1777 an act of assembly provided that the chancellor shall and may hear and determine all causes for alimony, in as full and ample a manner as such causes could be heard and determined by the laws of England, in the ecclesiastical courts there.

Under that statute, alimony is granted to the wife whenever the English courts would be authorized to render a divorce from bed and board; but the court has no power to extend the remedy, and decree a divorce also.

The inherent jurisdiction of a court of equity to decree alimony has also been acknowledged in Alabama. In North Carolina, bills of equity by the wife against the husband, praying alimony, were sustained, from an early day, without question as to the lawfulness of the jurisdiction.

Where such a decree has been made, whether done as an inherent power in equity to grant a decree for alimony, or as an auxiliary to enforce the payment of it as an incident of a divorce *a mensa et thoro*, there are no decisions, either in the English or American books, denying the wife's right to sue her husband for arrears of alimony due, by her next friend.

In some of the States she may do so, without the intervention of her next friend; but she cannot do that, as has been said before, in the courts of the United States having equity jurisdiction.

We think also that the cases which have been cited in this opinion are sufficient to show, whatever may have been the doubts in an earlier day, that a wife under a judicial sentence [* 598] * of separation from bed and board is entitled to make a domicile for herself, different from that of her husband,

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and that she may by her next friend sue her husband for alimony, which he had been decreed to pay as an incident to such divorce, or when it has been given after such a decree by a supplemental bill. In our best reflections we have been unable to come to a different result. The privileges allowed to a wife under such circumstances rest upon the facts that the separation is only grantable *propter Sævitiā*; that the alimony commonly allowed is no more than enough to give her a home and a scanty maintenance, almost always necessarily short of that from which her husband has driven her; and that as a consequence she should be permitted to change her domicile, where she may live upon her narrow allowance with most comfort and the least mortification. Her right to sue her husband, by her next friend, for alimony already decreed, rests upon higher considerations, or upon legal principles which have been so well expressed by Chief Justice Shaw, as to her right to sue in the State of Massachusetts, that we will use his language, deeming it to be applicable in any other State in the American Union:

“After such a divorce, the law of this commonwealth recognizes her right to acquire and hold property, to take her own earnings to her own use, for the maintenance of herself and her children. She is deprived of the protection, and exempted from the control, of her husband. She may by the decree of the court granting the divorce, and pursuant to the provision of the statute law of the commonwealth, be charged with the custody, and consequently with the support and maintenance, of the children of the marriage. The reason, therefore, why a wife cannot sue or be sued without joining or being joined with her husband, does not exist. The relation in which the divorce *a mensa et thoro* places the parties opposes a joinder. If it were necessary to join the husband as plaintiff, he might release her rights, by which she would be subjected to costs; if he might be joined as defendant, he might be made subject to her debts; both of which consequences are repugnant to the true relation of divided and separate interests, in which the law by such a decree places them. Whilst the law thus recognizes * the right of a woman so divorced to acquire [* 599] and take the proceeds of her industry to her own use, it recognizes her power to make contracts; and if she could not sue and be sued, it would present the anomalous case in which the law recognizes a right without affording a remedy for vindicating it, and subjects a party to a duty without lending its aid to enforce it.

We do not deem it necessary to show, further than it has already been done in this opinion, that the equity side of the court was the

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appropriate tribunal for this cause. We have, however, verified the correctness and applicability of several of the cases cited in his argument by the counsel of the complainant to sustain that point, and deem them decisive.

The only point remaining for our determination is that which questions the complainant's right to pursue her remedy in the equity side of the district court of the United States in the State of Wisconsin.

The facts are, that she married the defendant in the State of New York, the State then of her husband's domicile; that they lived there until the decree of separation was made; that she has retained it ever since as her domicile, but that the defendant, after the decree of separation was given, left her domicile in New York for another in the State of Wisconsin, in which he says that he has acquired a domicile. The complainant comes into court in the character of citizen of the State of New York. Mrs. Barber is recognized to be such by the laws of that State, and her *status* as a divorced woman *a mensa et thoro* by a court of competent jurisdiction in New York, and the rights of citizenship which she has under it there, are decisive of her right to sue in the courts of the United States, as that has been done in this instance. The citizenship of the defendant is admitted and claimed by him to be in the State of Wisconsin. His voluntary change of domicile from New York to Wisconsin makes him suable there. That might have been done in a State court in equity as well as in the district court of the United States; but she had a right to pursue her remedy in either. She has chosen to do so in a court of the United States, which has jurisdiction over the subject-matter of her claim to the same extent that a court [* 600] of equity of a State has, and we think that the *court below has not committed error in sustaining its jurisdiction over this cause, nor in the decree which it has made. We affirm the decree of that court, and direct a mandate to be issued accordingly.

Mr. Chief Justice TANEY, Mr. Justice DANIEL, and Mr. Justice CAMPBELL, dissented.

Mr. Justice DANIEL:

From several considerations, which to me appear essentially important, I am constrained to differ in opinion with the majority of the court in this case.

1. With respect to the authority of the courts of the United States to adjudicate upon a controversy and between parties such as

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are presented by the record before us. Those courts, by the constitution and laws of the United States, are invested with jurisdiction in controversies between citizens of different States. In the exercise of this jurisdiction, we are forced to inquire, from the facts disclosed in the cause, whether during the existence of the marriage relation between these parties the husband and wife can be regarded as citizens of different States? Whether, indeed, by any regular legal deduction consistent with that relation, the wife can, as to her civil or political *status*, be regarded as a citizen or person?

By Coke and Blackstone it is said: "That by marriage, the husband and wife become one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated or consolidated into that of the husband, under whose wing and protection she performs everything. Upon this principle of union in husband and wife, depend almost all the rights, duties, and disabilities, that either of them acquire by the marriage. For this reason, a man cannot grant anything to his wife, nor enter into a covenant with her, for the grant would be to suppose her separate existence, and to covenant with her would be only to covenant with himself; and therefore it is generally true, that all compacts made between husband and wife, when single, are voided by the intermarriage." (Co. Lit. 112; Bla. Com.

vol. * 1, p. 442.) So, too, Chancellor Kent, (vol. 2, p. [* 601] 128:) "The legal effects of marriage are generally deducible from the principle of the common law, by which the husband and wife are regarded as one person, and her legal existence and authority in a degree lost and suspended during the existence of the matrimonial union."

Such being the undoubted law of marriage, how can it be conceived that pending the existence of this relation the unity it creates can be reconciled with separate and independent capacities in that unity, such as belong to beings wholly disconnected, and each *sui juris*? Now, the divorce *a mensa et thoro* does not sever the matrimonial tie; on the contrary, it recognizes and sustains that tie, and the allowance of alimony arises from and depends upon reciprocal duties and obligations involved in that connection. The wife can have no claim to alimony but as wife, and such as arises from the performance of her duties as wife; the husband sustains no responsibilities save those which flow from his character and obligations as husband, presupposing the existence and fulfillment of conjugal obligations on the part of the wife. It has been suggested that by the regulations of some of the States a married woman, after separation, is permitted to choose a residence in a

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community or locality different from that in which she resided anterior to the separation, and different from the residence of the husband. It is presumed, however, that no regulation, express or special, can be requisite in order to create such a permission. This would seem to be implied in the divorce itself; the purpose of which is, that the wife should no longer remain *sub potestate viri*, but should be freed from the control which had been abused, and should be empowered to select a residence and such associations as would be promotive of her safety and her comfort. But whether expressed in the decree for separation, or implied in the divorce, such a privilege does not destroy the marriage relation; much less does it remit the parties to the position in which they stood before marriage, and create or revive ante-nuptial, civil, or political rights in the wife. Both parties remain subject to the obligations and duties of husband and wife. Neither can marry during

[* 602] the * lifetime of the other, nor do any act whatsoever which is a wrong upon the conjugal rights and obligations of either. From these views it seems to me to follow, that a married woman cannot during the existence of the matrimonial relation, and during the life of the husband the wife cannot be remitted to the civil or political position of a *feme sole*, and cannot therefore become a *citizen* of a State or community different from that of which her husband is a member.

2. It is not in accordance with the design and operation of a government having its origin in causes and necessities, political, general, and external, that it should assume to regulate the domestic relations of society; should, with a kind of inquisitorial authority, enter the habitations and even into the chambers and nurseries of private families, and inquire into and pronounce upon the morals and habits and affections or antipathies of the members of every household. If such functions are to be exercised by the federal tribunals, it is important to inquire by what rule or system of proceeding, or according to what standard, either of ethics or police, they are to be enforced. Within the range subjected to the political, general, and uniform control of the federal constitution, there are numerous commonwealths, and within these are ordinances much more numerous and diversified, for the definition and enforcement of the duties of their respective members. Now, to which of these ordinances, or to which of these various systems of regulation, will the federal authorities resort as a source of jurisdiction, or as a rule of decision, especially when it is borne in mind that to is only between members of different communities, persons legitimately subject to such separate rules of obligation

or policy, that the tribunals of the federal government have cognizance; when, too, it is recollected that the federal government is clothed with no power to execute the laws of the States. The federal tribunals can have no power to control the duties or the habits of the different members of private families in their domestic intercourse. This power belongs exclusively to the particular communities of which those families form parts, and is essential to the order and to the very existence of such communities.

It has been suggested, that by the decree for separa- [603] tion *a mensa et thoro*, the husband and wife have become citizens of different States, and that the allowance to the wife is in the nature of a debt, which, as a citizen of a different State, she may enforce against the husband in the federal courts. This suggestion, to my mind, involves two obvious fallacies. The first is the assumption, that by the decree the wife is made a citizen at all, or a person *sui juris*, whilst yet she is wife, still bound by her conjugal obligations, the faithful observance of which, on her part, is the foundation of her claim to maintenance as wife, and which claim she would forfeit at any time by a violation of these obligations. Indeed, the form of her application is an acknowledgment that she is not *sui juris*, and not released from her conjugal disabilities and obligations, for she sues by *prochein ami*.

The second error in the position before mentioned is shown by the character and objects of the allowance made as alimony to a wife. This allowance is not in the nature of an absolute debt. It is not unconditional, but always dependent upon the personal merits and conduct of the wife—merits and conduct which must exist and continue, in order to constitute a valid claim to such an allowance. This allowance might unquestionably be forfeited upon proof of criminality or misconduct of the wife, who would not be permitted to enforce the payment of that to which it should be shown she had lost all just claim; and this inhibition, it is presumed, might embrace as well a portion of that allowance at any time in arrears, as its demand in future. The essential character, then, of this allowance, viz: its being always conditional and dependent, both for its origin and continuation, upon the circumstances which produced or justified it, is demonstrative of the propriety and the necessity of submitting it to the control of that authority whose province it was to judge of those circumstances. That authority can exist nowhere but with the power and the right to control the private and domestic relations of life. The federal government has no such power; it has no commission of *ensor morum* over the several States and their people.

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But, irrespective of the disability of the wife as a party, [* 604] I *hold that the courts of the United States, as courts of *chancery*, cannot take cognizance of cases of alimony.

It has been repeatedly ruled by this court, that the jurisdiction and practice in the courts of the United States *in equity* are not to be governed by the practice in the State courts, but that they are to be apprehended and exercised according to the principles of equity, as distinguished and defined in that country from which we derive our knowledge of those principles. Such is the law as announced in the cases of *Robenson v. Campbell*, (3 Wheaton, 212;) of the *United States v. Howland*, (4 Wheaton, 108;) of *Boyle v. Zacharie & Turner*, (6 Peters, 648.) It is repeated in the cases of *Story v. Livingston*, (13 Peters, 359,) and of *Gaines v. Relf*, (15 Peters, 9.) Now, it is well known that the court of chancery in England does not take cognizance of the subject of alimony, but that this is one of the subjects within the cognizance of the ecclesiastical court, within whose peculiar jurisdiction marriage and divorce are comprised. Of these matters, the court of chancery in England claims no cognizance. Upon questions of settlement or of contract connected with marriages, the court of chancery will undertake the enforcement of such contracts, but does not decree alimony as such, and independently of such contracts.

In *Roper on the Law of Baron and Feme*, (vol. 2, p. 307,) it is stated that Lord Loughborough, in a case in 1 Vesey, jun., 195, is reported to have said, that if a wife applied to the court of chancery upon a *supplicavit* for security of the *peace* against her husband, and it was necessary that she should live apart as incidental to that, the chancellor will allow her separate maintenance. That this passage has been quoted by Sir William Grant in 10 Ves. 397, and that the same opinion was advanced in the case of *Lambert v. Lambert*, (2 Brown's Parliamentary Cases, p. 26.) "But," continues this writer, "there seems to be no reported instance of such a jurisdiction, and it would be inconsistent with the object and form of the writ of *supplicavit*;" and he concludes with the position that "the wife can only obtain a separate maintenance in the ecclesiastical courts where alimony is decreed to be paid during the pendency of any suit between husband and wife, and after [* 605] its * termination, if it ends in a sentence of separation on the ground of the husband's misconduct."

From the above views, it would seem to follow, inevitably, that as the jurisdiction of the chancery in England does not extend to or embrace the subjects of divorce and alimony, and as the jurisdiction of the courts of the United States in chancery is bounded by

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that of the chancery in England, all power or cognizance with respect to those subjects by the courts of the United States *in chancery* is equally excluded.

It has been said that, there being no ecclesiastical court in the United States, many of the States have assumed jurisdiction over the subjects of divorce and alimony, through the agency of their courts of equity. The answer to this suggestion is, first, that it concedes the distinction between the character and powers of these different tribunals. In the next place, it may have been that the jurisdiction exercised by the State courts may have been conferred by express legislative grant; or it may have been assumed by those tribunals, and acquiesced in from considerations of convenience, or from mere toleration; but whether expressly conferred upon the State courts, or tacitly assumed by them, their example and practice cannot be recognized as sources of authority by the courts of the United States. The origin and the extent of their jurisdiction must be sought in the laws of the United States, and in the settled rules and principles by which those laws have bound them.

DECISIONS
OF THE
SUPREME COURT OF THE UNITED STATES,
DECEMBER TERM, 1859.

JUSTICES OF THE COURT.

HON. ROGER B. TANNEY, CHIEF JUSTICE.
HON. JOHN MCLEAN,
HON. JAMES M. WAYNE,
HON. JOHN CATRON,
HON. PETER V. DANIEL,
HON. SAMUEL NELSON,
HON. ROBERT C. GRIER,
HON. JOHN A. CAMPBELL,
HON. NATHAN CLIFFORD,
JEREMIAH S. BLACK, ATTORNEY GENERAL.
WILLIAM THOMAS CARROLL, CLERK.
BENJAMIN C. HOWARD, REPORTER.
WILLIAM SELDEN, MARSHAL.

ASSOCIATE JUSTICES.

JOEL PARKER, Plaintiff in Error, *v.* ALONZO L. KANE.

22 H. 1.

RES JUDICATA—DEED, DESCRIPTION IN—PARTITION.

1. Where a party to a partition, prosecuted in the State court of Wisconsin, filed his bill in the same court, asserting an adversary title as to part of the land, he is bound by the final decree, in a subsequent action of ejectment on the same title, against the other parties and their privies to the first suit.
2. Where there is a specific and clear description in a deed of the land conveyed, it will limit words of a more general meaning by which other land would be included.
3. Under the recording acts of Wisconsin, when the grantee and grantor, in a deed which had been fully executed and delivered, destroyed it without recording it, and made another deed in its place, a purchaser for value without notice of the first deed will be protected against any title set up under it.

THIS was a writ of error to the district court of the United States for the district of Wisconsin. It was an action of ejectment brought

by plaintiff in error, and the case is sufficiently stated in the opinion of the court.

Mr. Gittings and Mr. Machen, for plaintiff in error.

Mr. Brown, for defendant.

[* 11] * Mr. Justice CAMPBELL delivered the opinion of the court.

The plaintiff sued in ejectment to recover certain parcels of land included in the northeast fractional quarter of section twenty-one, in township seven north, of range twenty-two east, in the district of lands subject to sale at Green Bay, and are situated in the city of Milwaukee.

The fractional quarter is subdivided into three lots. Lot number one is north of a line running east and west, that bisects the quarter-section; lot number six corresponds to the southeast quarter of the quarter section; and the third lot is a tract of forty acres, and is known as the southwest quarter of the northeast quarter of the section, township, and range, above mentioned.

A patent issued to William E. Dunbar, for this fractional quarter, in 1837, from the United States, in which the land is described as "the lot number one, and south half of the

[* 12] northeast * quarter of section twenty-one, in township number seven north, of range twenty-two east, of the district of lands," &c. In the same year, Dunbar and wife conveyed to Richard Montague "one equal undivided fourth part of the following described parcel or tract of land, viz: Lots one (1) and six, (6,) being that part of the northeast quarter lying east of the Milwaukee river, in section number twenty-one, in township number seven (7) north, of range twenty-two east," &c.

The plaintiff, upon the trial of the cause in the district court, connected himself with this deed (which was duly recorded) by legal conveyances. Besides the title under this deed, he exhibited a title from Dunbar and wife to an undivided fourth of the whole fraction; all of which lies east of Milwaukee river. That the plaintiff had at one time a title to an undivided half of lots one and six, was not disputed; but his claim to an undivided fourth of the southwest quarter of the fraction, under the deed of Dunbar to Montague, was a matter of controversy.

The defendant connected himself with the patent of Dunbar, by showing a sale by the administrator of his estate, under the authority of the court of probate of Milwaukee, of an undivided one-half of the entire fractional quarter patented to him, and a sale

and conveyance by the guardian of the heirs of Dunbar of an undivided fourth part of the southwest quarter of the fraction, under a decree of the circuit court of Milwaukee, sitting in chancery, and a purchase by persons under whom he claims.

The defendant, to repel the claim of the plaintiff to any interest in the land possessed by him in lots numbers one and six, produced the record of proceedings and decrees in the circuit court of Milwaukee county, in chancery, for the partition of those lots among the plaintiff and his co-tenants, with the latter of whom the defendant is a privy in estate. This record shows that a petition was made by the co-tenants of the plaintiff for a partition of these lots according to their rights and interests. The plaintiff was made a party, appeared and answered, and there was a decretal order for a partition. Commissioners were appointed to divide the lots, who made *a report to the court that appointed them. That [* 13] the plaintiff made objections to the proceedings, was overruled, and afterwards appealed to the supreme court. That the supreme court revised the proceedings of the circuit court, and affirmed its decree in the most important particulars, and gave some directions, which, being fulfilled to the satisfaction of the circuit court, a final order of confirmation, and to vest the title in the parties to their several allotments, was made.

The plaintiff objects to these proceedings:

1. That there was no authority to make a several partition between the complainants.
2. There was no authority to make a partition, subjecting the land set off as his share to an easement.
3. There was no authority to make a partition by a plat, without the establishment of permanent monuments.
4. There was no reference to a proper person to inquire into the situation of the premises, after the decree settling the rights of the parties.
5. The commissioners had no power to set apart and designate any portion of the land for sale, as they undertook to do.
6. The court did not ascertain and distinctly declare whether any part or what part should be sold; but its language was hypothetical and uncertain. All the subsequent proceedings must fall, for want of the foundation of such a decree.
7. It does not appear that all the commissioners met together, in the performance of their several duties, as required by the statute.

The statutes of Wisconsin provide for the partition of estates held in common, by a bill in equity, filed in the circuit court of the county in which the land is, and for a sale of the premises when a partition would be prejudicial to the owners. The court upon the hearing may determine and declare the rights, titles,

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and interests, of the parties to the proceedings, and order a partition. It may appoint commissioners to execute the decree, who are required to make an ample report of their proceedings to the court, in which it can be confirmed or set aside. When a partition is completed, the court may enter a decree; and thereupon the partition is declared to be "firm and effectual forever," and "to bind and conclude" all the parties named therein.

[* 14] * The decrees are subject to the revising power of the supreme court. In reference to the objections made by the plaintiff, it is sufficient to say that some of them were made in the courts of Wisconsin without effect, and all might have been urged there at a proper stage in the proceedings. *Kane v. Parker*, 4 Wis. 123.

That it sufficiently appears that the subject was within the jurisdiction of those courts, and the proper parties were before them; and this court, conformably to their established doctrine, acknowledge the validity and binding operation of these orders and decrees, and determine that this court cannot inquire whether errors or irregularities exist in them in this collateral action. *Thompson v. Tolmie*, 2 Pet. 157; *Grignon v. Astor*, 2 How. 319; *Beauregard v. New Orleans*, 18 How. 497.

At the time that the partition of lots numbers one and six was sought for, a petition was filed in the same court by the same parties for a partition of the southwest quarter of the fractional quarter section described in Dunbar's patent. The plaintiff had an acknowledged interest in that parcel, independently of his claim under Montague, and was made a party to that suit.

In his answer to the petition he refers to this claim under Montague, and the mesne conveyances that connect him with the deed of Dunbar to Montague. He stated, that, it being uncertain whether that deed of Dunbar would be sustained as sufficient by the court to convey a legal title to a fourth part of that parcel, he designed to file a bill in equity, for the purpose of having his title ascertained, and to have his conveyances reformed, if need be, so that his claim under that deed could be established and confirmed. In the same month he filed in the same court a bill in equity against the heirs of Dunbar and their guardian, and the purchasers under the decrees, obtained by the administrator and guardian, for the sale of the parcels in the fractional quarter described in Dunbar's patent.

He charges in this bill that Montague was equally interested with Dunbar, at the date of his entry in the land office, in the entire fraction, and furnished the money for the purpose

of * making it; that Dunbar gave to Montague a deed [* 15] for one-half, according to the description in the certificate of purchase from the register of the land office. That by a subsequent contract his interest was reduced to one-fourth. That his first deed not being recorded, he surrendered it to Dunbar, who destroyed it. That the deed for the fourth part was made to fulfill the agreement for title to a fourth of the whole fraction; and that Dunbar represented this deed to be sufficient, and during his life acknowledged that it was sufficient, and that Montague was a joint and equal owner with him.

He avers that these facts constitute him the owner of one-fourth of the entire fraction, either at law or in equity. He refers to the sales of a larger interest than they really owned, by the heirs of Dunbar, through their guardian, and to the pendency of the suits of partition. He prays that the court will require the defendants in the bill to release their title to the interest embraced in his claim, and that his conveyances may be reformed, if need be, to express his legal and equitable rights; but if the court should decide that the guardian of the children of Dunbar had conveyed a good and valid title as against him, he prayed for a personal decree for the proceeds of his sale. He also prayed that this suit might be heard with the partition suit of the claimants under Dunbar's administrator and the guardian of his children, and for all general and equitable relief.

The purchasers asserted in their answers the superiority of their legal and equitable title, and pleaded that they were *bona fide* purchasers, and all, except one, also pleaded the statute of limitations. The guardian answered, that he had made the sale in good faith, under a valid decree, and under the belief that his wards were entitled to the estate.

The circuit court, upon the pleadings and proofs, dismissed the bill of the plaintiff, and declared in the decree that the defendants had a valid title as *bona fide* purchasers, not affected by the registered deed from Dunbar to Montague.

From this decree the plaintiff appealed to the supreme court. That court affirmed the decree of the circuit court as to all the purchasers, except one. They say the plaintiff is * not [* 16] entitled to relief under the first deed of Dunbar to Montague, which had been destroyed; for, admitting that the destruction of the deed did not disturb the title, nevertheless, in view of the statute of frauds, and the rule of evidence that statute established, a grantee in a deed, who had voluntarily, and without fraud or mistake, destroyed his deed, could not establish his title. One of

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the purchasers, who had notice of the plaintiff's claim, and had failed to plead the statute of limitations, was decreed to release his title to the plaintiff, and the guardian was required to account to him for the price he had received. *Parker v. Kane*, 4 Wis. 1. The defendant is a privy in estate with the successful litigants in this cause, and relies upon the decree as a bar.

We have seen that the jurisdiction of the circuit court of Milwaukee, under the statute of Wisconsin, in matters of partition, extends to the ascertainment and determination of the rights of the parties in matters of partition, and that its decree is final and effectual for their adjustment. That court is also clothed with power, at the suit of a person having a legal title and possession, to call any claimant before it, to quiet a disputed title. Rev. Stat. Wis. 573, sec. 20; 417, sec. 34.

The bill seems to have been framed on the distinct and declared purpose of obtaining from the courts of Wisconsin an authoritative declaration of the legal as well as equitable rights of these parties under their conflicting titles, with a view to the partition of the entire fractional quarter section, suits for which were then pending; and the prayer of the bill, that if the conveyance of the guardian "passed a good and valid title against the plaintiff," that then he might be indemnified by a decree for the proceeds of the sale in the hands of the guardian, submitted the legal as well as the equitable relations of the parties, under their respective titles, to the judgment of the court.

The reversal of the decree of the circuit court by the supreme court, and their decision that the guardian should account for the proceeds of the sale in his hands, is a direct response to this prayer, and implies that the recorded deed of Dunbar to Mon-
[* 17] tague did not convey a legal title to this *fraction. We question whether the voluntary dismissal of the bill, as to Martineau, the guardian, subsequently to its return in the circuit court, will qualify this decree, or limit its effect as *res judicata* of the legal right. 30 Miss. R. 66; 2 Free Ch. R. 158; 9 Simon R. 411; Eng. Orders in Ch. 1845, n. 117.

In Great Britain, a chancellor might have considered this as a case in which to take the opinion of a court of law, or to stay proceedings in the partition and cross-suits until an action of law had been tried, to determine the legal title. *Rochester v. Lee*, 1 McN. and G. 467; *Clapp v. Bronagh*, 9 Cow. 530. But such a proceeding could not be expected in a State where the powers of the courts of law and equity are exercised by the same persons. The parties to this ejectment and the suit in chancery court of Wiscon-

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sin are the same, or are privies in estate. The same parcel of land is the subject of controversy, and the object of the suit, if not identical, is closely related.

The object of the bill in chancery, as we have seen, was to obtain from the court a decision upon the legal and equitable titles of the plaintiff, with the immediate view to a partition. If the decision had been made in his favor, it is true that a change of possession would not have taken place, as an immediate consequence, but it would have conclusively established the right of the plaintiff, either in an action of ejectment or upon a writ of right.

The object of the suit of the plaintiff in chancery was to obtain a recognition of the sufficiency of his deeds, as entitling him to the land, or to supply their defects, or to afford him indemnity, by subjecting the price that his adversaries had paid for the land to a tortious vendor having the legal title.

The object of the ejectment suit is to recover the land by means of the title disclosed in the deeds. A portion of the judges find in the two suits *eandem causam petendi*, and that the decrees of the circuit and supreme courts of Wisconsin embraced the decision of the same questions, and are conclusive of this controversy. *Bank of U. S. v. Beverly*, 1 How. 135. But if the plaintiff is not concluded by the proceedings of the *courts of [* 18] Wisconsin, the question arises, whether his legal title will support his claim to the interest in the southwest quarter of the fraction.

The first deed from Dunbar to Montague was destroyed before the second was made, and it never was placed upon record. The decree of the courts of Wisconsin shows that the purchasers of the guardian were *bona fide* purchasers without notice. That deed is therefore inoperative, under the statutes of Wisconsin in relation to the registry of deeds. Territorial Statutes of Wisconsin, 179, sec. 10; Rev. Stat. of Wis. 329, 350, secs. 24, 34, 35.

We agree with the supreme court of Wisconsin, that the recorded deed from Dunbar to Montague did not convey any part of the fractional quarter, except that contained in lots numbers one and six. Lot number one is a subdivision of the fractional quarter section, and is designated in the plat of survey, as well as in the patent. Lot number six is referred to in the pleadings and proofs as a known and recognized parcel, corresponding with an official subdivision; and, upon referring to the official surveys in the general land office, we find that it is, as we had supposed it from the evidence in the record to be, noted there. The deed of Dunbar designates these subdivisions as the *corpus* of his conveyance.

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as a further description, adds, "being that part of the northeast quarter lying east of the Milwaukee river."

These lots lie east of the Milwaukee river, but there is within the fractional quarter a tract equally distinct, and marked as lots numbers one and six, and this fact has occasioned this controversy. The description of the property conveyed as lots numbers one and six of the fractional quarter is a complete identification of the land, having reference to the official surveys of the United States, according to which their sales are made. The more general and less definite description cannot control this; but whatever is inconsistent with it will be rejected, unless there is something in the deed, or the local situation of the property, or of the possession enjoyed, to modify the application of this rule. It cannot be controlled by

the declarations of the parties, or by proof of the negotiations *or agreements on which the deed was executed.

Hall v. Combes, Cro. Eliz. 368; Jackson v. Moore, 6 Cow. 706; Drew v. Drew, 8 Foster, 489; 4 Cruise Dig. 292; 35 N. H. R. 121; 5 Metcalf, 15.

Upon the whole case, we are of opinion there is no error in the record injurious to the plaintiff, and that the judgment of the district court must be affirmed.

Mr. Justice CLIFFORD dissented.

J. J. B. WHITE and others, Plaintiffs in Error, v. WRIGHT, WILLIAMS & Co.

22 H. 19.

JURISDICTION OVER JUDGMENTS OF STATE COURTS.

A question of merger, of the cause of action in a former judgment, or of *res judicata* in another State, as it affects the mere form of pleading, is not one of which this court can take jurisdiction from a State court.

THIS was a writ of error to the supreme court of the State of Louisiana.

The plaintiffs below sued on an account against defendant, White, and, pending the suit, he obtained a judgment for the same in the court of the State of Mississippi. He thereupon filed an amended petition in the Louisiana court, setting up the judgment so recovered, and prayed for judgment as in his original petition. Defendant filed exceptions, to the effect that the original cause of action was merged in the judgment of the Mississippi court, and that the

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court in Louisiana was divested of jurisdiction by those proceedings. Also pleaded *res judicata*.

Mr. Benjamin moved to dismiss the writ, because the case does not show jurisdiction within the twenty-fifth section of the judiciary act.

* Mr Justice McLEAN delivered the opinion of the court. [* 22]

This is a writ of error to the supreme court of the State of Louisiana.

The defendant in error, by his counsel, J. P. Benjamin, Esq., moves the court that the writ of error issued in this cause be dismissed, for the reason that this case is not one in which the court has jurisdiction to revise the decision of the supreme court of Louisiana.

* On looking into the record, there appears to be no [* 23] ground on which this writ of error can be maintained.

There is no complaint that the obligation of a contract has been impaired, nor that any right has been claimed and refused under any treaty or act of congress. The cause must therefore be dismissed, for want of jurisdiction.

WILLIAM B. LAWLER, Appellant, v. HORACE B. CLAFIN and others.

22 H. 23.

PRACTICE IN MORTGAGE FORECLOSURE IN MINNESOTA.

1. Where, under the code of procedure in the courts of Minnesota territory, a jury is waived, and a case tried without exceptions, the appellate court there cannot review the facts.
2. The only question open in this court, as the record comes here, is whether the mortgage was discharged; and this court concurs with the supreme court of the territory that it was not.

APPEAL from the supreme court of the territory of Minnesota.
The case is stated in the opinion.

Mr. Stevens and *Mr. Brisbane*, for appellant.

Mr. Gillet, for appellees.

* Mr. Justice McLEAN delivered the opinion of the court. [* 25]
This is an appeal from the supreme court of the territory of Minnesota.

The suit was brought on a mortgage executed the first day of

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October, 1852, by Ann Curran, the duly-authorized attorney in fact of William B. Lawler, conditioned for the payment of the sum of four thousand dollars, being part of lot three, in block thirty, in the town of St. Paul, forming an oblong square, [* 26] forty-two feet on Third street by eighty feet * on Roberts street. This mortgage was duly recorded on the day subsequent to that of its execution.

This mortgage, it was alleged, was executed to secure a sum of money then due to the plaintiffs, and which was likely to become due, in the further purchase of merchandise from the plaintiffs by the defendant. The plaintiffs accepted the mortgage, as security for purchases to be made, or any debts which the firm of Curran & Lawler might subsequently owe the firm.

The understanding and agreement between the parties was, that the mortgage was to be held by plaintiffs as a pledge or collateral security, and was not to be canceled or delivered up until all purchases which Curran & Lawler might make, and which might become due at any time within the year—that is, before the first of October, 1853. So long as anything should remain due on such purchases, the indebtedment was to be considered and deemed secured by the mortgage.

The payment of the note and mortgage, as alleged by Curran & Lawler in their answer, is denied; and it is stated that the amount of indebtedment on the note and mortgage, at maturity, was upwards of five thousand dollars.

It is difficult to determine the character of the loose papers certified from the supreme court of Minnesota to this court. They have neither the form nor the substance of a record. The papers seem to be thrown together, as much by accident as design; and one can scarcely gather any special object in reading the transcripts. It would seem that neither certainty nor order can be extracted from these papers, and that some form should be adopted by which the pleadings should be stated, and the points controverted, whether of fact or of law. Many objections are made to questions propounded to witnesses, but no exceptions seem to have been taken.

A jury seems to have been waived, and the facts were submitted to the court. In such a case, the question of law arising on the facts would appear to have been decided by the court. Still, no exception is taken. In fact, there seems to be nothing for this court to try, except the validity of the mortgage and the fact of its [* 27] discharge. And, even in this *matter, the evidence is in conflict, and it is difficult to decide the point disputed.

The mortgage was for four thousand dollars, and was to stand

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as a security for the balance due the plaintiffs; and in this way it was intended to give an additional credit to the company. From the manner in which the mortgage was treated, it appears to have been designed as a standing guaranty for the sum named.

And, in the language of the court, the said "action having come on to be heard at the May term of the district court of Ramsey county, upon the complaint of the plaintiffs and the answer of the said William B. Lawler, before the presiding judge of said court, a jury trial therein having been waived by the respective parties, the same having been decided in favor of the plaintiffs, and that there is due on the notes and mortgage upon which the action is brought the sum of four thousand four hundred and ninety-five dollars and forty cents, with interest from the 4th October, 1853, amounting in all to \$5,084.07; and, on motion, it was ordered, adjudged, and decreed, that the mortgaged premises, or so much thereof as may be necessary, be sold by the sheriff for the payment of the mortgage; and it is further ordered, adjudged, and decreed, that the defendants, and all persons claiming under them, be forever barred," &c.

On the appeal of Lawler and others from the district court of Ramsey county to the supreme court of the territory, "the matters at issue in this cause having been fully considered, it appears to this court that, in the proceedings, decree, and judgment thereon, in the district court of Ramsey county, to this court appealed from, there is no error. It is therefore ordered that said decree and judgment be in all things affirmed, with costs," &c.

From this last decree there is an appeal now pending before this court.

In looking into the facts of this case, it does not appear that the merits are changed by the views taken by the district court of Ramsey county, or by the decision of the supreme court of the territory.

*The evidence is against the discharge of the mortgage. [* 28] After the amount claimed under the mortgage, there is still a balance due the plaintiffs on general account.

Upon the whole, the decree of the supreme court of the territory is affirmed; and the cause is remitted to the supreme court of the State of Minnesota, to be carried into effect as the law authorizes.

Emerson v. Slater.

CHARLES EMERSON, Plaintiff in Error, v. HORATIO N. SLATER.

22 H. 28.

CONSTRUCTION OF CONTRACTS—PAROL EVIDENCE.

1. The court adheres to its decision in this case, when here before, that the time of performance of the written contract was material; and no recovery could be had on that agreement unless strict performance was proved. 1 Miller, 658.
2. But the undertaking of Slater, a stockholder in the railroad company, in that instrument, was an original undertaking on a sufficient consideration, and was not an agreement to answer for debt of another, within the meaning of the statute of frauds.
3. Therefore a subsequent parol agreement to enlarge the time for the performance, on good consideration, of the work by plaintiff, is admissible in evidence under the common counts.

THIS is a writ of error to the circuit court for the district of Massachusetts. It has been before the court previously, and is reported in 1 Miller, 658. The case is sufficiently stated there and in the present opinion.

Mr. Hutchins and *Mr. Cushing*, for plaintiff in error.

Mr. Bates, for defendant.

[* 35] * Mr. Justice CLIFFORD delivered the opinion of the court.

This case comes before the court upon a writ of error to the circuit court of the United States for the district of Massachusetts. It was an action of assumpsit, brought by the plaintiff in error against the present defendant, upon a written agreement, bearing date on the fourteenth day of November, 1854.

By the terms of the instrument, the plaintiff covenanted and agreed with the defendant, in consideration of the agreements of the latter therein contained, and of one dollar to him paid, that he, the plaintiff, would complete all the bridge work to be done by him for the Boston and New York Central Railroad Company, ready for laying down the rails for one track, by the first day of December next after the date of the contract. In consideration whereof, the defendant agreed that he would pay the plaintiff, within two days from the date of the agreement, the sum of forty-four hundred dollars in cash; and also give to the plaintiff, on the completion of the bridges, and when the rails for one track were laid from Dedham to the foot of Summer street, in Boston, his, the defendant's, five notes, for two thousand dollars each, dated when given, as provided, and made payable to the plaintiff or order, in six months from their date. Another stipulation of the agreement was, that the notes, when paid, were to be applied towards the indebtedness of the railroad company to the plaintiff, and that the agreement was in

no way to affect any contract of the plaintiff with the railroad, or any action then pending between them.

When the declaration was filed, it contained three special counts, drawn upon the written agreement, together with the common counts, as in actions of *indebitatus assumpsit*.

* Performance on the part of the plaintiff, and neglect [*36] and refusal on the part of the defendant to give the five notes specified in the agreement, after seasonable demand, constitute the cause of action set forth in the several special counts. They differ in nothing material to be noticed in this investigation, except that, in the first count, performance on the part of the plaintiff is alleged, according to the contract, on the first day of December, 1854, while in the second and third counts it is alleged at a period twenty days later.

An additional special count was afterwards filed by consent, which, in one respect, varies essentially from the other counts. After setting out the substance of the contract, it alleges that the defendant waived performance at the day stipulated in the agreement, and extended the time to the twentieth day of the same December, and that the plaintiff performed and completed the work within the extended time. Demand of the notes prior to the commencement of the suit, substantially as alleged, was admitted at the trial, as were also the execution of the agreement and the payment by the defendant of the forty-four hundred dollars.

As appears by the transcript, the cause has been twice tried upon the same pleadings. At the first trial, the verdict was for the plaintiff; but the defendant excepted to the rulings and instructions of the circuit court, and, after judgment, removed the cause into this court by writ of error.

Among the questions presented on the writ of error, the principal one was whether, by the true construction of the written agreement, time was of the essence of the contract. That question was directly presented by the fourth exception; and this court held, that the refusal of the circuit judge to instruct the jury, as prayed by the defendant, that the plaintiff could not recover on the special counts without showing that the work was completed by the day stipulated in the contract, was error. Accordingly, the judgment was reversed, and the cause remanded, with directions to issue a new venire.

In the opinion delivered on the occasion, this court said, in effect, that in cases where time is of the essence of the contract, there can be no recovery on the written agreement, * with- [*37] out showing performance within the time limited; but

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added, that a subsequent performance and acceptance by the defendant will authorize a recovery in a *quantum meruit*. Slater v. Emerson, 19 How. 239.

Failing to show performance at the day named in the agreement, the plaintiff, at the last trial, offered to prove by parol to the effect that, after the date of the agreement, and before as well as after the day specified for the completion of the work, the defendant, by his conduct, acts, and declarations, waived and dispensed with performance at the day named in the written agreement, and agreed to substitute therefor performance on the twentieth day of the same December, and to deem performance on the day last named as equivalent to performance on the day specified in the written agreement, and that the work was fully performed within the extended time.

Objection was made by the defendant to this testimony, upon the ground, that the written agreement declared on was a special promise for the debt, default, or misdoings of another; and that the alleged waiver, substitution, and extension, not being in writing, were within the statute of frauds; and the court sustained the objection, and excluded the testimony. To which ruling of the court plaintiff excepted.

He then proposed to proceed upon the common counts, and offered evidence accordingly. After reading the agreement set up in the special counts, he introduced three deeds, each dated November 17, 1854, purporting to convey certain parcels of real estate therein described. They were each given by the railroad company to the defendant, to indemnify him for the liability he assumed in the before-mentioned written agreement with the plaintiff. Estimating the value of the real estate so conveyed by the considerations expressed in the respective deeds, it amounted in the aggregate to the sum of thirteen thousand five hundred dollars.

He also introduced a memorandum agreement between the defendant and the railroad company, whereby the former leased to the latter ten hundred and fifty tons of railroad iron, to be laid down by the company and used on their railroad. By the [* 38] terms of the last-named agreement, the railroad iron * was estimated at the value of sixty-eight thousand four hundred dollars; and the company agreed to pay the defendant, for the use of the iron, five thousand dollars per month, the first payment to be made on the first day of March then next, and so upon the first day of each succeeding month, until the whole sum was paid, with interest on the same from a given day—the defendant agreeing, if there was no default of the payments, when the whole was

paid, to sell and deliver the iron to the company for the estimated value, including the interest. .

To secure these payments, together with the interest, the railroad company, by the same instrument, assigned and set over to the defendant the proceeds of the railroad, to an amount equal to the estimated value of the iron, with the interest, and authorized and required the superintendent of the road to retain in his own hands, out of the proceeds, a sum sufficient to pay the amount to the defendant, in the manner and at the time specified in the agreement.

Emerson's contract with the railroad company was also introduced, and makes a part of the record. It bears date on the seventeenth day of December, 1853, and provides, on the one part, that the plaintiff shall build and complete, sufficient for the passage of an engine over the same by the first day of May then next, all the bridging, as then laid out and determined upon by the engineer, from the wharf, near the foot of Summer street, in Boston, to Dorchester shore, and to complete the same as soon thereafter as might be reasonably practicable. On the other part, the agreement prescribes the compensation to be paid by the railroad company to the plaintiff, for building and completing the respective works therein designated and described, stipulating that eighty-five per cent. upon the estimated value of the materials furnished, and seventy-five per cent. upon the estimated value of the labor performed, should be paid monthly, as the work was done, and that the balance should be paid by the company upon the completion and acceptance of the whole work.

Parties to the suit are by law competent witnesses in the courts of Massachusetts; and under that law the plaintiff was examined in this case.

* He also called and examined five other witnesses. From [* 39] this parol testimony, it appears that securities were put into the hands of the defendant, deemed by him and the company adequate, at the time, to indemnify him against his contract with the plaintiff. Those securities, two of the witnesses say, consisted of real estate, and the bonds of the company for seventeen thousand dollars, secured by a mortgage upon the road. In respect to the real estate, it is to be observed that the deeds of conveyance bear date three days after the date of the contract; but the presumption from the circumstances is a reasonable one, that they were given in pursuance of the arrangement made at the time the contract was executed. It also appeared that the company failed in July, 1854, and that it was actually insolvent at the date of these transactions.

Prior to the date of the agreement of the 14th of November, 1854, the plaintiff had stopped work under his contract with the company, and refused to continue it. As soon as the contract with the defendant was made, he resumed the work on the bridges, and finished them about the middle of December, 1854; but the rails were not all laid by the company until the twenty-first day of the same month.

At the date of the contract between these parties, the defendant was a large stockholder in the corporation, and holder of the bonds of the company, which were secured by a mortgage of the road to trustees. During the progress of the work under the contract between these parties, and before the day therein named for the completion of the work, the officers of the company, or some of them, repeatedly stated to the plaintiff, in the presence of the defendant, and without objection on his part, that all the company wanted was, that the plaintiff should keep out of the way of the track-layers.

Three of the directors, including the defendant, on the twenty-fourth day of November, 1854, called on the plaintiff while he was at work on one of the bridges, and inquired of him if he could complete it by the fourth day of the then next month, stating to him the reason why it was desirable that he should do so—and by working nights and Sundays he completed it, according to their request.

[*40] *Several witnesses state—and among the number the one who laid the rails for the company—that the track-layers were not delayed by the plaintiff; and the plaintiff testified that the defendant never objected because the bridges were not completed by the day specified in the written agreement. On being recalled, he further testified that he paid, for work done and materials furnished after that day, the sum of eleven thousand one hundred and fifty-seven dollars and eighty-four cents, and that he had not received a dollar for it from any source.

Thereupon the presiding justice ruled and instructed the jury that, upon this testimony, the plaintiff was not entitled to recover on the common counts, and directed the jury to return their verdict for the defendant. Accordingly, the jury found that the defendant never promised; and the plaintiff excepted to the rulings and instructions of the court.

Several questions were discussed at the bar, which, in the view we have taken of the case, it will not be necessary to decide.

Both of the exceptions to the rulings and instructions of the court necessarily involve the construction of the contract between

these parties; but the question presented is widely different from the one considered and decided by this court on the former record. On that occasion, the single question of any importance was, whether, by the true construction of the contract, it was agreed and understood between the parties to the instrument that the completion of the work at the time therein prescribed was a condition on which the obligation of the defendant to give the notes was to depend.

Contrary to the ruling of the circuit judge, this court held that the covenants of the respective parties were dependent, that time was of the essence of the contract, and remanded the cause for a new trial.

That rule of construction, beyond doubt, is the law of the contract, and no attempt has been made to evade or question it on either side in this controversy. But the question now presented is of a very different character.

It is insisted by the plaintiff that the promise of the defendant * was an original undertaking, on a good and [*41] valid consideration, moving between the parties to the instrument. On the part of the defendant, it is insisted that his undertaking was a special promise for the debt, default, or misdoings, of another, and so within the statute of frauds.

If the theory of the plaintiff be correct, then it would seem to follow that the rulings and instructions of the circuit court were erroneous. Verbal agreements between the parties to a written contract, made before or at the time of the execution of the contract, are in general inadmissible to vary its terms, or to affect its construction. All such verbal agreements are considered as merged in the written contract. But oral agreements subsequently made, on a new and valuable consideration, and before the breach of the contract, in cases falling within the general rules of the common law, and not within the statute of frauds, stand upon a different footing. Such subsequent oral agreements, not falling within the exception mentioned, may have the effect to enlarge the time of performance specified in the contract, or may vary any other of its terms, or may waive and discharge it altogether. On this point, the authorities are numerous and decisive, of which the following are examples: *Goss v. Nugent*, 5 Barn. and Ad. 65; *Nelson v. Boynton*, 3 Met. 402. Speaking of the exceptions to the general rule, that parol evidence is not admissible to contradict or vary the terms of a written instrument, Mr. Greenleaf says: "Neither is the rule infringed by the admission of oral evidence to prove a new and distinct agreement upon a

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new consideration, whether it be a substitute for the old one, or in addition to and beyond it; and if subsequent, and involving the same subject-matter, it is immaterial whether the new agreement be entirely oral, or whether it refers to and partially or totally adopts the provisions of the former contract in writing, provided the old agreement be rescinded and abandoned." 1 Green. Ev. 303. But the rule, so far as it is applicable to this case, is better stated by Lord Denman, in *Goss v. Nugent*, 5 Barn. and Ad. 665, where-in he says: "After the agreement has been reduced into writing, it is competent to the parties, in cases falling within [* 42] * the general rules of the common law, at any time before the breach of it by a new contract, not in writing, either altogether to waive, dissolve, or annul, the former agreement, or in any manner to add to or to subtract from or vary or qualify the terms of it, and thus to make a new contract." That rule was afterwards qualified by the same learned judge in a particular not essential to the present inquiry; and with that qualification it appears to be the rule constantly applied by the English courts, in cases not within the statute of frauds, to the present time. *Harvey v. Grabham*, 5 Ad. and El. 61; 1 Phil. Ev. (Cow. & Hill's ed.) p. 563, n. 987; *Munroe v. Perkins*, 9 Pick. 298; *Snow v. Inhabitants of Ware*, 13 Met. 42; *Vicary v. Moore*, 2 Watts, 451; *Cummings v. Arnold*, 3 Met. 489; *Fleming v. Gilbert*, 3 Johns. R. 528.

On the other hand, assuming the theory of the defendant to be correct, that by the true construction of the contract, his undertaking was a special promise for the debt, default, or misdoings, of the railroad company, then perhaps the better opinion is, according to the weight of authority, that a written contract within the statute of frauds cannot be varied by any subsequent agreement of the parties, unless such new agreement is also in writing. *Marshall v. Lynn*, 6 Mee. and Wels. 109; *Goss v. Nugent*, 5 Barn. and Ad. 58; *Harvey v. Grabham*, 5 Ad. and El. 61; *Stowell v. Robinson*, 3 Bing. N. C. 927; *Stead v. Dowber*, 10 Ad. and El. 57; *Emmet v. Dewhurst*, 8 Eng. L. and Eq. 88; *Hasbrouk v. Tappan*, 15 Johnson's R. 200; *Blood v. Goodrich*, 9 Wen. 68; *Stevens v. Cooper*, 1 Johnson's Ch. R. 429; *Clark v. Russell*, 3 Dall. 415. Decided cases, however, are referred to, from the Massachusetts reports, which evidently wear a different aspect, and it is contended by the counsel for the plaintiff that the principle adopted in those cases constitutes the rule of decision in this case; but it is unnecessary to determine that point at the present time, as we are of the opinion that the promise of the defendant contained in the written agreement was an original undertaking, on a good and valid

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consideration moving between the parties to the instrument. *Nelson v. Boynton*, 3 Met. 396; *Stearns v. Hall*, 9 Cush. 31.

* Cases in which the guaranty or promise is collateral [*43] to the principal contract, but is made at the same time, and becomes an essential ground of the credit given to the principal debtor, are, in general, within the statute of frauds. Other cases arise which also fall within the statute, where the collateral agreement is subsequent to the execution of the debt, and was not the inducement to it, on the ground that the subsisting liability was the foundation of the promise on the part of the defendant, without any other direct and separate consideration moving between the parties. But whenever the main purpose and object of the promisor is not to answer for another, but to observe some pecuniary or business purpose of his own, involving either a benefit to himself, or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability. *Nelson v. Boynton*, 3 Met. 400; *Leonard v. Vredenburg*, 8 Johns. R. 39; *Farley v. Cleveland*, 4 Cow. 432; *Alger v. Scoville*, 1 Gray, 391; *Williams v. Leper*, 3 Bur. 1886; *Castling v. Aubert*, 2 East. 325; 2 Parsons on Con. 306. Nothing is better settled than the rule, that if there is a benefit to the defendant, and a loss to the plaintiff, consequential upon and directly resulting from the defendant's promise in behalf of the plaintiff, there is a sufficient consideration moving from the plaintiff to enable the latter to maintain an action upon the promise to recover compensation. 2 Addison on Con. 1002, and cases cited. Other authorities state the proposition much stronger, authorizing the conclusion that benefit to the party by whom the promise is made, or to a third person at his instance, or damage sustained at the instance of the party promising, by the party in whose favor the promise is made, is sufficient to constitute a good and valid consideration on which to maintain an action. *Violet v. Patton*, 5 Cr. p. 150; Chitt. on Con. p. 28; *Townsley v. Sumrall*, 2 Pet. p. 182.

Apply these principles to the terms of the written agreement, in view of the attending circumstances and the subject matter, and it is quite clear that the promise of the defendant

* was an original undertaking on a good and valid con- [*44] sideration moving from the plaintiff at the time the instrument was executed. On its face it purports to be a contract between the parties, for their own benefit; one agreeing to do certain work, and furnish certain materials, and the other agreeing to pay therefor a stipulated compensation. Their promises are mutual, and in

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one respect dependent. In consideration that the plaintiff engaged to do the work and furnish the materials by a given day, the defendant, on his part, agreed, among other things, when the work was completed, to give the plaintiff the five notes therein described. Reference was made to the contract of the plaintiff with the railroad company in the first instance, as descriptive of the work to be done, and of the materials to be furnished; and in the second instance, doubtless for the reason that, as a part of the transaction, the company had placed, or agreed to place, securities in the hands of the defendant, to indemnify him for the liability he thereby assumed to the plaintiff. Part of those securities were delivered over to the defendant at the time, and the residue as soon thereafter as the conveyances could conveniently be made. But when we consider the attending circumstances, the presumption is much stronger that the arrangement was one mainly, if not entirely, for the individual benefit of the defendant.

Prior to that date, the railroad company had failed, and was utterly insolvent, owning nothing, it seems, except the securities transferred to the defendant for his indemnity in this transaction, and the franchise of the road. Unlike what was exhibited in the former record, it now appears that the defendant had large interests of his own, separate from his relation to the company as a stockholder, which were to be promoted by the arrangement. He had leased to the company railroad iron for the use of the road, amounting in value to the sum of sixty-eight thousand dollars, and, as a security for payment, held an assignment of the proceeds of the road to that amount, with interest, which was to be paid in monthly installments of five thousand. Now, unless the bridges were completed and the road put in a condition for use, there would [* 45] be no proceeds; * and as he had already taken into his possession all the available means of the company to secure himself for this new liability, should the road not be completed, the company could not pay for the iron.

In this view of the subject, it is manifest that the arrangement was one mainly to promote the individual interest of the defendant. Damage also resulted to the plaintiff, as is obvious from the whole transaction. Under his contract with the company, they had stipulated to pay him monthly eighty-five per cent. upon the estimated value of the materials furnished, and seventy-five per cent. upon the estimated value of the labor performed as the work was done. Failing to receive those monthly payments from the company, the plaintiff, as he had a right to do, stopped the works, and refused to proceed, in consequence of the failure of the company to make

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the monthly payments. To remedy this difficulty, and insure the completion of the bridges so as to render the road available for use, this arrangement was made by the defendant. It was not an arrangement to pay a subsisting indebtedness, but only for work to be done and materials to be furnished; monthly payments were discontinued, and the plaintiff was induced, with an advance of forty-four hundred dollars, to resume and complete the work at his own expense. Without detailing more of the evidence, as exhibited in the statement of the case, it will be sufficient to say that, in view of all the attending circumstances, we think it is clear that the promise of the defendant was an original undertaking upon a good and valid consideration moving between the parties to the written agreement.

For these reasons, we think the plaintiff had a right to proceed upon the common counts, and that it was error in the presiding justice to direct a verdict for the defendant. It is also contended by the plaintiff that the effect of the indemnity given by the railroad company to the defendant was to take the contract out of the statute of frauds; but we do not find it necessary to determine that question at the present time.

The judgment of the circuit court is therefore reversed, with costs, and the cause remanded with directions to issue a new venire.

JOHN OVERTON and others, Plaintiffs in Error, v. ELIJAH CHEEK and GEORGE W. CHEEK.

22 H. 46.

PRACTICE IN SUPREME COURT—DEFECTIVE WRIT.

Where the writ or the copy of the writ of error filed with the transcript has no seal, the writ is void, and the case must be dismissed.

WRIT of error to the circuit court for the western district of Tennessee.

This was a motion to dismiss the writ of error. The facts are stated in the opinion.

Mr. Davidge, for the motion.

Mr. Gillet, opposed.

* Mr. Justice McLEAN delivered the opinion of the court. [* 47]

This purports to be a writ of error to the circuit court of the United States for the district of West Tennessee.

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By reference to the transcript, it appears that the judgment of the circuit court was rendered the sixteenth of April, 1857. At the ensuing term of the supreme court, the transcript was filed.

It appears that a writ of error in the circuit court was allowed, in open court, and signed by the clerk the seventeenth day of April, 1857, which was returnable to the supreme court on the first Monday of December, 1857. But this writ had no seal, nor [* 48] was it returned with the transcript to the *supreme court.

But on the twenty-seventh of December, 1859, a paper was filed in the clerk's office, in form of a writ of error, but without a seal, and having no authenticated transcript annexed.

From this it appears that no writ of error has been certified with the transcript, and that the paper purporting to be a writ of error, which was filed in December last, being without seal, was void. Two terms of this court have intervened, not including the present term, since the transcript was certified, without a writ of error.

The cause must therefore be dismissed for these irregularities, without noticing others apparent on the record.

THE BRIGADIER GENERAL STOKES.

STEPHEN O. NELSON and others, Appellants, *v.* LUCIUS C. LELAND and others, Claimants.

22 H. 48.

ADMIRALTY JURISDICTION—COLLISION.

1. The admiralty jurisdiction extends to the Yazoo river, although it is wholly within the State of Mississippi, and the stage of the water is sometimes too low for practicable navigation.
2. In that narrow stream, at a time when steamboats are using it, a flat-boat should have lights on each end in the night, oars at each end also, and should descend the stream with its length parallel to the current, and not diagonally across it; and for failing to observe these matters, the boat was in fault.
3. The steamer was also in fault, because the pilot, mistaking the light which he saw on the boat for a landing place, did not stop his vessel until he could be assured he was right. The boat is responsible for such mistakes, when they might be avoided by due care.
4. The question of the jurisdiction of the inferior court is always a proper one for appeal to this court, and must stand for hearing on the merits. It is no ground for dismissal here on motion.

APPEAL from the circuit court for the eastern district of Louisiana. It was a case of collision in the Yazoo river, the particulars of which are fully stated in the opinion.

At the December term, 1857, *Mr. Gillet* moved to dismiss the

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appeal upon the ground of want of jurisdiction in the district court. The Chief Justice delivered the opinion of the court on the motion, holding that such want of jurisdiction was a proper ground of appeal, and could only be considered on the merits, and overruled the motion.

The case was now argued by *Mr. Pike*, for appellants.

Mr. Gillet, for appellees.

* Mr. Justice McLEAN delivered the opinion of the court. [* 50]

This is an appeal in admiralty from the circuit court of the United States for the eastern district of Louisiana.

The libelants allege that they were the consignees of a certain flat-boat called "Clear the Track," and of three hundred and sixty-six bales of cotton, which were shipped to them by various persons by said flat-boat; that said boat left Sardinia, on Yakana river, in the State of Mississippi, on the 19th February, 1853, bound for New Orleans; that on the 2d March ensuing, on said voyage, descending the Yazoo river, about eight miles below the head of Honey Island, and within the admiralty jurisdiction, about four o'clock on the morning of said day, the flat-boat, being a stanch, tight, and well-built vessel, completely rigged and well provided with tackle, apparel, and furniture, and having on board a full complement of men to navigate the boat, being about the middle of the said Yazoo river, leaving sufficient space on either side for a steamboat or other large vessel to pass, and having a light upon the flat-boat, the captain and crew of the boat being up, the steamboat Brigadier General R. H. Stokes, ascending the said river, struck the flat-boat "Clear the Track" in the bows, which caused her to fill with water, and become a complete wreck; that the steamboat rung her bell, recognizing the light of the flat-boat, but continuing to run up the middle of the river.

In their answers, the respondents say that the collision set forth in the libel occurred on the Yazoo river, about fifty miles above the foot of said island, and more than two hundred miles above the mouth of the Yazoo, where it falls into the Mississippi river; and that the entire length of the Yazoo river is within the State of Mississippi; and they allege that the district court has not jurisdiction of the matters and things, or the claim alleged in the libel against the respondent. And the respondent denies that the collision was caused or did happen by any fault, negligence, or want of skill, in the officers or crew of the steamboat; and they say it

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was caused by the unskillful management of the flat-boat; and the proper place for the flat-boat, it is said, was at the shore [* 51] at night; and that * there was not sufficient space for the steamboat to pass between the flat-boat and the shore.

D. B. Miller says: I have seen the flat-boat; she seemed to have a sufficient number of hands on board, and to be well managed. From the size of the boat, witness thinks she was suitable for the navigation of the Yazoo and Mississippi rivers, and from her size she would carry three hundred and fifty bales of cotton and more.

Jackson Harris is of the same opinion. James D. Bell examined the boat well, and considered her strong and well built. Saw her loaded with three hundred and forty bales of cotton, and says she would have carried fifty more bales safely. Capt. Williams was captain of the flat-boat "Clear the Track" when the collision occurred. Besides himself, he had five hands and one passenger, who also worked. Witness began his trip at Sardinia, on the Yakana river. The flat-boat had three hundred and seventy-one bales of cotton on board. Nothing of importance occurred until the morning of the second of March, 1853, when a steamer was heard coming up the river, which afterwards proved to be the Brigadier General R. H. Stokes. Witness had laid down about twelve o'clock that night, but was shortly afterwards awaked by Johnson, one of his hands, who informed him a steamboat was approaching, and he desired witness to be on deck. Witness saw the steamer approaching, at a distance of about half a mile. A light on deck was immediately prepared. At this time, the steamboat was about four or five hundred yards out of sight round the point. The witness ordered his men, four of whom were on deck at the time, to throw the boat out from the point, so as to give the steamer room to pass. Continued efforts were made for this purpose, until the collision occurred.

When the boats came together, all hands were at the oars, except Mr. Johnson, who held the light. The steamboat could be seen across the point. It was some fifteen minutes, the steamboat being in full view, before the boats came into collision. The flat-boat was struck on the first stanchion from the corner of the bow nearest the point of the nosing, about three feet from the [* 52] jackstaff of the steamer. The collision was * very severe—so great as to knock every one down on the flat-boat. Witness was knocked down senseless by the crane-neck of the oar, but he saw all the others fall before he fell. When witness recovered from the effect of the blow, he perceived the steamer had passed out of his view. Every effort was made to stop the hole made in

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the flat-boat by the steamer, and by working the pump, to keep the boat from sinking. The boat floated down some twenty-five miles before they could land her. In less than an hour after the collision, the boat sank six feet deeper in the water, and became unmanageable; and a landing was made, with great difficulty, at some three or four o'clock in the afternoon.

The steamer Stacey came down the river the next day, and she took on two hundred bales of the cotton, including the thirty-five on shore. Before the arrival of the Stacey, witness had engaged the steamboat McLean to go up and take up the cotton that could be saved.

Witness has been engaged in flat-boating on the Yazoo river for the last eighteen years. He does not consider the place where the collision happened as unsafe to run a flat-boat at night, and that it is not usual to tie up flat-boats in that part of the river.

The witness says the flat-boat had a torch made of split pine boards, as usual on such occasions. The Stacey met the flat-boat in a very narrow part of the river, much narrower than where the flat-boat met the Stokes. The Stacey was much nearer the flat-boat when she rang her bell than the Stokes, but she backed out of the way. The Stacey is double the size of the Stokes, it being the largest boat that runs up the Yazoo.

Mr. Johnson is corroborated by others in his statement. Thomas Barnes says the steamer did not change her course after seeing the flat-boat. The steamer was not hurt. Her jackstaff was knocked off, which was replaced. Did not hear Captain Williams offer any assistance to the flat-boat. At the time the steamer struck the flat-boat, she was nearly in full headway.

Witness thinks there was time enough for the steamer to *get out of the way of the flat-boat. The master of [* 53] the boat entered a regular protest against the steamer. A number of witnesses referred to facts which have no material bearing in the case.

On the part of the respondent, it was proved by William F. Moulding, the pilot on the Yazoo since 1845, and was so acting on the Stokes when the collision occurred, eight miles from the head of Honey Island: The bell was rung to stop at Hall's landing. Directly after ringing the large bell to land, saw a light, as he supposed, at the landing. The river was narrow and the current swift. After running a short distance, and rounding the point, saw the flat-boat about three hundred yards above the steamer. He immediately rang the bell to stop the engines, and then to back her, which was done. When she had made about six revolutions,

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the collision took place. The steamboat was nearly at a stand. The flat-boat was floating nearly broadside down the river. There was no possible means by which a collision could be avoided. The steamboat could not pass on either side of the flat-boat. This, however, is controverted by other witnesses, who say that there was space on each side of the flat-boat for the steamer to pass up the river.

That the light on the flat-boat was seen some two or three hundred yards by the steamer approaching the flat-boat, is admitted; but it is urged that a steady light should have appeared on the flat-boat; that a waving lighted torch often misleads an ascending boat, on the supposition that it is on shore, and designates a landing-place. Several of the witnesses say, that on observing the approach of the flat-boat, the wheel of the steamer was reversed, and some five or six revolutions had been performed when the collision occurred. Some of the witnesses think that the force of the steamer was checked, so that its movement up the river could scarcely be perceived when the steamer struck the flat-boat.

It has happened in this case, as in all other cases of collision, that the witnesses on board of their respective boats, from the circumstances which surrounded them, and the favorable impressions naturally felt in regard to the efforts made by their [* 54] * respective crews to save the property and lives under their charge, differ widely in their opinions. The steamboat received but little or no injury by the collision; but the flat-boat, in its structure and cargo, received material injury. The evidence fully proves this, not only in regard to the flat-boat and cargo, but also as to the expense and loss to which the owner was subjected.

It is unnecessary to go into detail to show the facts proved. It is enough to know the character of the transaction, and the responsibilities incurred by the respective parties.

The general rule is, where two vessels meet each other, one propelled by steam and the other by the winds, the steamer must give way, and avoid a collision. To this no one can object; but, like other general rules, it may be subject to exceptions.

The Yazoo extends, from its junction with the Mississippi river, some two hundred miles and upwards into the State of Mississippi, and in some parts its navigation requires care and experience. Its channel widens and deepens as the volume of water increases; but it is a narrow river, and its course is crooked—but the Stacy and other boats of a large class for inland boats, navigate it with success.

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Several of the steamboat witnesses think that a flat-boat, laden with three hundred and seventy bales of cotton, ought not to run on a dark night, but should be tied up, where the channel is narrow, and have fixed lights, which distinguish it from a place of landing. Other witnesses differ from the above, and say that an inland navigation so long and important as this, ought to be left free to the enterprise of its inhabitants. This is more congenial to the spirit of our people than a regulation which would retard commerce, without any adequate beneficial results. No measure of this character could well be adopted, without an accurate survey of the river, in which the points of danger should be designated. Until this shall be done, it would seem most judicious not to go beyond a regulation for boats, passing each other in ascending and descending this river, having lights, and giving notice of their approach. There are regulations which apply to our internal * navigation, embracing our rivers and other waters. [* 55] Under these, every master of a boat should act with a presumed knowledge of his duty, and be held responsible accordingly.

We think, in several particulars, the captain of the flat-boat was in fault. He should have had one or more steady and fixed lights on one or more conspicuous parts of his boat. He should have been careful, by having the upper and lower end sweeps or oars so worked as to have occupied near the shore of the river, giving a sufficient passage to the ascending steamboat. Especially he should have so guided his boat as to have kept it on a straight line of the water, and not on a diagonal course. It is easily perceived that, from the position of the flat-boat, it was difficult, if not impracticable, to ascend the river by the steamer without striking the flat-boat, in the position it occupied.

But we think there was also fault in the steamer. In rounding the point, it is admitted, the steamer was at least three hundred yards below the flat-boat. Seeing the light ahead, the master, in the use of ordinary caution, should have stopped his boat at once, and reversed her wheels, until the locality of the light was clearly ascertained. It is no excuse, that he mistook the light for a place of landing. The commander cannot lessen his responsibility by alleging his mistake. He is bound to make no mistake, for it is his duty to stop his boat where he doubts, until he ascertains the facts. Had this been done, the collision could not have occurred. He could have backed his boat, until he avoided the flat-boat. In not having done this, the steamer was in fault, and the damages must be divided between the two boats, and also the costs.

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Some doubts have been suggested whether, in the exercise of the admiralty jurisdiction, some limit may not be interposed.

Under the English system, the ebb and flow of the tide, with few if any exceptions, established the fact of navigability; and this was the course of decision in this country, until recently.

The vast extent of our fertile country, its increasing commerce, its inland seas, bays, and rivers, open to us a commercial [* 56] * prosperity in the future which no nation ever enjoyed.

Our contracted views of the English admiralty, which was limited by the ebb and flow of the tide, were discarded, and the more liberal principles of the civil law, equally embraced by the constitution, were adopted.

This law is commercial in its character, and applies to all navigable waters, except to a commerce exclusively within a State. Many of our leading rivers are sometimes unnavigable; but this cannot affect their navigability at other times. A commerce carried on between two or more States is subject to the laws and regulations of congress, and to the admiralty jurisdiction.

Upon the whole, the decree of the circuit court is reversed; and the cause is remanded, under the above order of this court.

Mr. Justice CAMPBELL dissented, and Mr. Justice CATRON concurred for the reason stated by him.

Mr. Justice CAMPBELL dissenting:

The decree in the circuit court, dismissing the libel in this cause, was rendered before the judgment in this court in the case of *Jackson v. Magnolia*, 20 How. 292, was given. There is no material difference in the cases. The reasons for the judgment of the circuit court in this case are contained in the opinion filed by me in that case. I do not consider it necessary or proper to repeat them here. I concur in the judgment of the court upon the merits of the cause.

Mr. Justice CATRON concurs with the opinion of the court, because the question of jurisdiction, involved in this cause, was ruled in the case of the *Magnolia*, referred to by Mr. Justice CAMPBELL.

SPRINGFIELD TOWNSHIP, Plaintiff in Error, v. JOHN H. QUICK, Auditor, and WILLIAM ROBESON, Treasurer, of Franklin County.

22 H. 56.

SCHOOL LANDS—APPLICATION OF THE FUNDS ARISING FROM THEIR SALE.

1. The fund arising from the sale of the sixteenth section in each township is, by act of congress, to be used exclusively for the schools in that township.
2. But an act of the State legislature which, preserving this principle, equalizes the distribution of school funds from other sources among all the townships, including this fund, but in such a manner that none of it is diverted, does not violate the act of congress, though a township may not get its proportionate share of the fund arising from other sources, by reason of the amount it receives from the sale of its sixteenth section.

WRIT of error to the supreme court of Indiana.

The State of Indiana passed a statute which directed that all the school fund, to which each county was entitled, including that from the sale of the sixteenth section, should be divided among the townships according to the number of children therein. The State court held this unconstitutional, as regarded the fund arising from the sixteenth section. The legislature then amended the law so as to declare that all the funds arising from that source should go exclusively to the township in which the section lay, whereby in some instances an *inequality* would result in the distribution of the school fund from other sources. The township of Springfield, which did not get a proportion of this latter fund equal to other townships, measured by the number of children, by reason of the larger sum arising from the sale of its sixteenth section, brought this suit to compel an equal distribution of that fund, without regard to the sixteenth section fund; and the case being decided against it in the State court, brought this writ of error.

Mr. Barbour, for plaintiff in error.

Mr. Jones, for defendants.

*Mr. Justice CATRON delivered the opinion of the court. [* 68]

The twenty-fifth section of the judiciary act declares, that where is drawn in question the construction of any statute of the United States, and the decision is against the right set up or claimed by either party under the act of congress, such decision may be re-examined, and reversed or affirmed, in the supreme court, on writ of error.

Here it is claimed, for the inhabitants of the township, that the fund arising from the proceeds of the sixteenth section shall not be estimated in distributing the general school fund of the State

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derived from taxes paid into the State treasury. The acts of the legislature equalize the amount that shall be appropriated for the education of each scholar throughout the State, taking [* 69] into the estimate the moneys derived from * the proceeds of the sixteenth section, with the proviso, that the whole of the proceeds shall be expended in the township. If it be *more*, then an equal portion to each scholar elsewhere furnished by the State fund—still, the township has the benefit of such excess, but receives nothing from the treasury; and, if it be less, then the deficiency is made up, so as to equalize according to the general provision.

And the question here is, whether the State laws violate the acts of congress providing that the proceeds of the sixteenth section shall be for the use of schools *in the township*. And our opinion is, that expending the proceeds of the sixteenth section for the exclusive use of schools “in the township” where the section exists, is a compliance with the legislation of congress on the subject; nor is the State bound to provide any additional fund for a township receiving the bounty of congress, no matter to what extent other parts of the State are supplied from the treasury.

The law is a perfectly just one; but if it were otherwise, and the school fund was distributed partially, nevertheless those receiving the bounty from congress have no right to call on this court to interfere with the power exercised by the State legislature in laying and collecting taxes, and in appropriating them for educational purposes, at its discretion.

We hold, that a true construction was given to the acts of congress referred to, and order that the judgment be affirmed.

CHARLES KOCK, Plaintiff in Error, v. LOUIS EMMERLING.

22 H. 69.

COMPENSATION OF REAL ESTATE BROKERS.

Where a person employed a real estate broker to sell his property, and the broker made a sale on terms to which the vendor and purchaser agreed, the broker is entitled to the usual compensation, notwithstanding his principal afterwards refused to complete the sale by executing the necessary writings.

WRIT of error to the circuit court for the eastern district of Louisiana. The case is fully stated in the opinion.

Mr. Pike, for plaintiff in error.

Mr. Benjamin, for defendant.

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* Mr. Justice McLEAN delivered the opinion of the court. [* 72]

This is a writ of error to the circuit court of the United States for the eastern district of Louisiana.

An action was brought by Emmerling, an alien, against Kock, a citizen of Louisiana, for the sum of five thousand dollars, on the purchase and sale of real estate.

Emmerling, it seems, being a broker, and engaged in the purchase and sale of real property, was employed by Kock to sell a certain plantation on the Bayou Lafourche, known as the Letory place, and by his written instructions, the 2d April, 1857, was authorized to sell this plantation above named at two hundred and fifty thousand dollars, payable one fifth cash, and the remainder in four equal installments, bearing eight per cent. interest.

The petitioner, it is alleged, after visiting the plantation at various times, and with different persons, finally, on the 19th of April, 1857, made an agreement with Jacob Denny, a resident of Louisiana, to purchase the plantation at the price fixed, provided the said Kock would so change the terms of payment as to receive forty thousand dollars in cash, and the remainder in six annual installments, bearing seven per cent. interest.

Kock consented to the terms, and the 29th April he and Denny met at New Orleans to complete the contract. Kock insisted that for the first year's credit a good acceptance for thirty thousand dollars should be given, and agreeing, if this were done, the five thousand dollars remaining on the first term should be equally divided among the other five terms, so that the first year's payment should be thirty thousand dollars, and the other five credit terms should be thirty-six thousand dollars each. And he agreed to take as satisfactory the acceptance of Messrs. Fellows & Co., or Messrs. Lavoe & McColl, commission merchants of New Orleans. Messrs. Fellows & Co. agreed to accept for [* 73] the thirty thousand dollars, and Denny offered to advance the forty thousand dollars, and in every other respect to carry out and complete the proposed contract. But Kock refused to comply with his agreement, capriciously, as it would seem, as he assigned no reason for his refusal, except that he was going to Europe on a visit with his family, and had no time to execute the title papers. Denny proposed to provide for the payments, and receive the title on his return, but he refused to sell the plantation.

The petitioner alleged that the contract was fully executed on his part, and on the part of Denny; and he claims a recompense for the service in which he was engaged, at the rate of two per cent. on two hundred and fifty thousand dollars, making the sum

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of five thousand dollars, said per centage being the usual established rate of broker's commission on the sales of plantations.

The defendant denies the allegations of the bill in the circuit court.

A judgment was entered in the circuit court for the sum claimed by the petitioner; from which judgment the defendant has appealed to this court.

In his statement of facts, the district judge says: "It is established by the proof that the price of the plantation was two hundred and fifty thousand dollars, and the rate of commissions of brokers on sales of plantations was two per cent." This is the ordinary mode of bringing before this court a writ of error on a statement of facts in Louisiana by the district judge. *McGavock v. Woodlief*, 20 How. 225.

There would seem to be no doubt on the merits of this case. The terms of the contract as to the sale were specific and unmistakable, and everything was done that could be done by the purchaser to carry out the contract; but the vendor, without any reason, refused to complete it.

The broad ground is assumed, that no contract of this character can be specifically enforced, unless it has been fully executed.

In the case of *McGavock*, above cited, the court say: "The terms of the sale, as given by the vendor to the plaintiff, [* 74] the *broker, were simple and specific, &c., and Long, the purchaser, agreed to these terms, as averred in the petition, and not questioned in the case; and if he had offered, and was in a condition to consummate the agreement according to its terms, no doubt the commission would have been earned, and the recovery below right." But a change was proposed by Long, which prevented the arrangement.

Civil Code, 2035, declares, "The condition is considered as fulfilled, when the fulfillment of it has been prevented by the party bound to perform it." In addition to this, the following authorities have been cited: *Righter v. Alamon*, 4 Rob. 45; *Wells v. Smith*, 3 La. Rep. 501; *Levistones v. Landreaux*, 6 Annual, 26; *Lestrade v. Perrera*, 6 Annual, 398.

It is not perceived why a contract to sell property, real or personal, on commission, should not be governed by the same rules as other sales. If a usage has been established in Louisiana, as seems to be the case, for the sales of plantations, such usage, being reasonable, should govern in the absence of a special agreement.

Nothing is more common in our large cities than to charge brokerage for procuring the loan of money. This varies as the

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money market rises or falls. One per cent., and sometimes two, is charged for this service. The same rule applies as to the sale of property. Where the contract is fair, it is not perceived why such compensation should not be paid, as agreed by the parties, or by an established usage.

Where the vendor is satisfied with the terms, made by himself, through the broker, to the purchaser, and no solid objection can be stated, in any form, to the contract, it would seem to be clear that the commission of the agent was due, and ought to be paid. It would be a novel principle if the vendor might capriciously defeat his own contract with his agent by refusing to pay him when he had done all that he was bound to do. The agent might well undertake to procure the purchaser; but this being done, his labor and expense could not avail him, as he could not coerce a willingness to pay the commission which the vendor had agreed to pay. Such a state of things could only arise from an express understanding * that the vendor was to pay nothing, un- [* 75] less he should choose to make the sale.

The judgment of the circuit court is affirmed.

Mr. Justice CATRON and Mr. Justice GRIER dissented.

ELISHA MORRILL, Plaintiff in Error, v. CONE and CONE.

22 H. 75.

SALE AND CONVEYANCE OF LAND UNDER POWER OF ATTORNEY—HOW FAR NECESSARY TO COMPLY WITH CONDITIONS OF THE POWER.

1. Where a power of attorney authorized the agent to sell and convey a large number of different parcels of land, but upon condition that any part of the purchase money not paid down must be secured by mortgage on real estate, this must be strictly complied with or the conveyance is void.
2. But, after long acquiescence and subsequent sale to *bona fide* purchasers, the statement of one of the grantors, that he is informed and believes that most of the lands had been sold without security or payment, except promissory notes, which he is informed and believes were in the hands of the agent when he died, a copy of which he annexes to his deposition, is inadmissible to contradict the presumption that the agent complied with the conditions of his power of attorney in this case.

THIS is a writ of error to the circuit court for the northern district of Illinois. The case is sufficiently stated in the opinion of the court.

Mr. Williams, for plaintiff in error.

Mr. Browning, for defendant.

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[* 79] * Mr. Justice CAMPBELL delivered the opinion of the court.

This suit was brought for the recovery of a parcel of
[* 80] land lying * in the tract appropriated for military bounties in Illinois, and granted by the United States in 1818 to Benjamin Abbott, a private in their army in the war of 1812, as bounty. The title of the plaintiff consisted of a certified copy of the patent to Abbott, and a quit-claim deed of Abbott to him, dated in 1855. He also produced a deed from Nathaniel Abbott to him, dated in 1838. The defendants exhibited the original patent to Abbott; his deed to Nathaniel Abbott, dated in 1818, for the same land; a deed from Nathaniel Abbott, John Low, and John D. Abbott, dated 12th September, 1820, to William O'Hara, and executed by Abraham Beck as attorney, and connected themselves with this deed by a number of mesne conveyances, the last of which was to the defendants, and was executed in April, 1850. They entered upon the land under this deed, and paid taxes until the commencement of this suit. These conveyances were recorded in the proper office. The questions presented by the bill of exceptions sealed for the plaintiff on the trial arise on the conveyances to William O'Hara, by Nathaniel Abbott, John Low, and John D. Abbott.

This deed purports to have been made upon a pecuniary consideration, the amount and receipt of which is acknowledged. The letter of attorney to Beck is dated the 14th July, 1820, and was recorded the 30th July, 1821. It authorizes the attorney to sell and convey some sixty-four parcels of land, including the one in dispute, in the military tract described in a schedule annexed, for such price and to such persons as he might think fit, and to make, execute, and deliver good and sufficient warranty deeds to them. To the ordinary testimonium clause a proviso was added, "that the condition is understood to be such, that our said attorney is to take sufficient security on real estate for all the lands which may be sold on a credit." The donors of this power of attorney reside in New Hampshire; the attorney in Missouri.

The plaintiff read a deposition of John Low, one of the donors of the power, from which we collect that Beck, the attorney, was verbally authorized to find a purchaser for the land described in the schedule, and other parcels in the military tract in
[* S1] Illinois, and agreed with O'Hara upon the price * and term of credit. That this agreement was communicated by letter to the witness, who sanctioned it, and sent a power of attorney to Beck to complete the sale and to execute the titles, but

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to reserve a mortgage on the lands sold to secure the payment of the purchase money.

O'Hara objected to giving a mortgage upon the lands purchased by him, but offered to give security upon other-real property. Thereupon the attorney prepared a deed for all the lands embraced in the contract to O'Hara, and took his notes for the purchase money, and gave to him his guaranty that his constituents would confirm the sale, and received from him a covenant that whenever Beck should receive a power of attorney to convey said lands and confirm his proceedings, and deliver the same to him, O'Hara, he would deliver to Beck for his constituents a sufficient mortgage upon real property to secure the price. The power of attorney produced by the defendants was prepared by Beck without the condition, and sent to Low, to be executed by him and the others, to enable him to fulfill the agreement. This was done by them after adding the condition, on the 12th February, 1821. The witness says that there was no such schedule attached to it. He answers from information and belief that Beck did not collect from O'Hara any money, or receive from him any further security. The district judge, upon this testimony, instructed the jury that the defendants had the superior title, and their verdict was accordingly rendered for them.

The authority conferred upon the mandatary by the letter of attorney is special and limited, and his acts under it are valid only as they come within its scope and operation. He was bound to conform to the conditions it contains, and in its execution to adopt the modes it indicates.

He was authorized to sell the lands for cash, or on a credit with security on real property, to execute a deed describing the consideration, acknowledging its payment, and to receive the money or securities the purchaser might render. *Peck v. Harriott*, 6 S. and R. 149; 9 Leigh R. 387. But he was not authorized to exchange the lands for other property, or to accept the notes of the vendee as cash, or to accept personal security, *or any [* 82] form of security except that specified in the condition.

Non est in facultate mandatarii addere vel demere ordini sibi dato. These propositions are not disputed as applicable to cases arising between parties to the original contract, in which the limitations on the authority and the circumstances of departure from it in the execution are understood. But it is contended that *bona fide* purchasers are entitled to repose credit in the recitals and declarations of the attorney as expressed in his deed, that disclose the mode in which the authority has been exercised, and will be protected

against their falsity. That the principal is estopped to deny their truth. This argument rests for its support upon the hypothesis that the delinquency of the mandatary is a breach of an equitable trust, a trust cognizable in a court of chancery only, a court that will not administer relief against a *bona fide* purchaser having the legal title. It assumes that the deed made by the attorney invests the grantee with the legal title, notwithstanding the non-compliance with the condition. If this were true the inference would follow. *Danbury v. Lockburn*, 1 Meri. 626. But the assumption is not tenable. The attorney was not invested with the legal estate. He was the minister, the servant, of his constituent, and his authority to convey the legal estate did not arise except upon a valid sale in accordance with the requirements of the power.

Doe v. Martin, 4 T. R. 39; *Minot v. Prescott*, 14 Mass. R. 495. The deed executed by the attorney is apparently within the scope of his power, and the admission of payment of the consideration is competent testimony of the fact. *American Fur Co. v. United States*, 2 Peters R. 358. But it is competent to his principal to show that the transaction was in appearance only, and not in fact within the authority bestowed.

And the question arises, was there any testimony to be submitted to the jury to repel the presumption that there was a *bona fide* execution of the trust reposed in the attorney? One of the donors of the power, but who does not appear to be interested in the land otherwise than by the recital in that instrument, admits his knowledge of the terms of the sale made to O'Hara; that this [* 83] power was remitted to Beck to validate * the contract, as far as it had been executed, and to enable him to complete it according to the engagement that had been entered into.

The power of attorney and the deed had been on the public records for thirty-four years before this suit was commenced, and for five years these defendants had been in the actual possession of the property. It had been repeatedly sold during this long period. To the inquiry made of the witness, whether the purchase money had been paid to the grantors, or whether the security on real property had been taken, he answers: "This affiant is informed and believes that most of the lands were sold to William O'Hara without security, or the payment of anything in hand upon the promissory notes of the said O'Hara, which, as this affiant is informed and believes, were in the hands of Beck at the time of his death, and copies of which * * * as he is informed and believes, * * * are annexed." It is the opinion of the court that this testimony was not admissible; and although it was read to the jury,

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it did not contain anything to warrant a conclusion unfavorable to the title of the defendants.

Judgment affirmed.

JOSEPH S. CUCULLU, Plaintiff in Error, v. LOUIS EMMERLING.

22 H. 83.

PRACTICE IN CASES FROM LOUISIANA.

Where a case is submitted to the circuit court in the district of Louisiana; and the court certifies to facts which support the plaintiff's claim, the defendant, who took no exception in the course of the trial, cannot be permitted here to argue that there was not sufficient evidence to sustain the finding of facts by that court.

WRIT of error to the circuit court for the eastern district of Louisiana. The matter is well stated in the opinion.

Mr. Taylor, for plaintiff in error.

Mr. Benjamin, for defendant.

* Mr Justice GRIER delivered the opinion of the court. [* 86]

The declaration charges that the plaintiff below was employed by Cucullu, as a broker, to sell a plantation; that he effected a sale on terms satisfactory to Cucullu; that the sale was consummated, by delivery of the property and receipt of the purchase money; and that for these services the plaintiff was entitled to a brokerage of two per cent., which Cucullu refused to pay.

The facts of the case are stated by the court below in the nature of a special verdict, finding the allegations of the declaration to be supported by the evidence.

It has been objected here, that such a contract cannot be proved by one witness, according to the law of Louisiana. That objection should have been made to the court below, if it is worth anything. But the case stated, made by the judge to whom the cause was submitted, finds facts, and not evidence of facts; consequently, this court cannot inquire, unless upon some bill of exceptions properly taken, whether the evidence was sufficient to justify the finding of the court. It would be granting a new trial, because the verdict is not supported * by the evidence, without any [* 87] bill of exceptions to the admission of testimony or to the charge of the court.

The judgment of the court below is therefore affirmed.

J. W. HODGE and others, Plaintiffs in Error, v. JOHN A. WILLIAMS.

22 H. 87.

JURISDICTION AND PRACTICE IN SUPREME COURT.

Where a writ of error describes the real plaintiff in error as defendant in error, and *vice versa*, the writ is fatally defective, and cannot be amended here; and the case must be dismissed for want of jurisdiction in this court.

WRIT of error to the district court for the eastern district of Texas.

Mr. Hughes, of counsel for Williams, called the attention of the court to the defect in the writ, and asked leave of the court to amend it; or, if this could not be done, that it be dismissed for want of jurisdiction. The opinion explains the grounds of the motion.

Mr. Chief Justice TANEY delivered the opinion of the court.

It appears, from the record in this case, that an action was brought in the circuit court of the United States for the eastern district of Texas, by John A. Williams, against Hodge and the other defendants named in the proceedings, and at the trial, the judgment was against the plaintiff.

The writ of error removing the case to this court is in the name of the defendants who succeeded in the court below, [* 88] *and do not desire to disturb the judgment; and the plaintiff in that court, who alleges error in the judgment, and seeks to reverse it, is made the defendant in the writ of error.

It is evident that the writ was intended to be sued out by the plaintiff in the court below, and that the names of the defendants, as plaintiffs in the writ, were used without their authority; for the errors are assigned by the plaintiff, and the bond states that a writ of error has been sued out by him, and the citation issued by the judge is directed to the defendants, and served on their counsel. And it is obvious that the writ in the name of the defendants was an oversight of the clerk by whom it was issued.

But the amendment proposed cannot be made here. An amendment presupposes jurisdiction of the case. And this court have no appellate power over the judgment of the court below, unless the judgment is brought here according to the act of congress—that is, by writ of error; and that writ, from its nature and character, must be sued out by the party who alleges error in the judgment of the inferior court. This writ is not mere matter of form, but matter of substance, prescribed by law, and essential to the jurisdiction of this court. And if it were amended here, by making the plaintiffs

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in error defendants, and the defendant in error the plaintiff, it would be a new writ made here, and not the one issued by the officer appointed by law.

Upon this principle, the court have uniformly refused to amend writs of error; and this must now be regarded as the settled practice of the court. It has repeatedly refused to amend, where the partnership name of a firm was used instead of the proper names of the parties; and in like manner it has refused to amend where the name of one or more of the parties were given, and the rest designated as *others* joined with them, without setting out the names of those intended to be included as *others*.

But the precise point now before us was decided in the case of *Hines v. Papin*, at December term, 1857. The same error was committed in that case which had been committed in this; and the error was equally apparent, as in the present instance, * from the recital in the bond and the citation and service. [* 89] The case was, indeed, even stronger for the amendment than this, for counsel appeared in this court for each of the parties, and offered to amend by consent. Yet the court refused to amend, upon the ground that consent of parties would not give jurisdiction, where it was not given by law and legal process. But here there is no appearance for the parties who are named as plaintiffs in the writ of error; and if we order the amendment, we should make them defendants in a suit in which they are not bound to appear in that character. It is the duty of the party who desires to bring a case before this court, to see that proper and legal process is sued out for that purpose; and if he fails to do so, he has no right to treat the defect as a mere clerical error, for which he is not to be held responsible.

The opinion in the case of *Hines v. Papin*, above referred to, was delivered orally, and not reduced to writing, and consequently, does not appear in the printed reports. The court have therefore deemed it advisable to state now the practice and doctrine of the court in this respect, in order that suitors may be aware of the necessity of paying proper attention to the process they issue, and not subject themselves to costs and delay by errors which a clerk, in the hurry and pressure of other business, will unavoidably sometimes commit.

The writ of error must therefore, upon the motion before the court, be dismissed, as it cannot be amended.

THE UNITED STATES, Appellants, v. JAMES D. GALBRAITH and others.

22 H. 89.

CALIFORNIA LAND GRANTS.

The decree of the district court confirming this claim is reversed and remanded for a further hearing and additional testimony, for the following reasons:

1. The titulo or concession was really made a few days before the possession of California by the Americans, and the date was altered to make it appear to have been February instead of June.
2. There was no actual occupation, though claimant swears there was.
3. The genuineness of the governor's signature seems to be very doubtful.

APPEAL from the district court of the United States for the northern district of California. The case is fully stated in the opinion.

Mr. Stanton and *Mr. Gillet*, for the United States.

Mr. Hepburn and *Mr. Brent*, for appellees.

[* 94] * Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from the district court of the United States for the northern district of California.

The appellees, who derived their title from Juan N. Padilla, the original grantee, presented their claim before the board of land commissioners in 1852, for five square leagues of land known by the name of *Bolsa de Tomales*, situate in the county of Sonoma, California. The board, after hearing the proofs, decreed in favor of the claim, which on appeal to the district judge, was affirmed.

The documentary evidence of the title includes a petition to the governor for the tract, dated at Monterey, May 14th, 1846, accompanied with a certificate of Manuel Castro, prefect, that

[* 95] * the land was vacant and grantable, dated same place, 10th same month; a marginal reference for information by the governor, Pio Pico, dated Los Angeles, 20th May, 1846; a note of concession, dated same place, 12th June, 1846; and a formal title, dated same time and place, both signed by the governor, and J. M. Moreno, secretary *ad interim*.

Proof was given of the signatures of the governor and secretary, and that these papers were found among the Mexican archives, which had been transferred to the custody of the surveyor general of the United States for California.

The original grant of the formal title to the grantee was given in evidence by the claimants, dated Los Angeles, 12th February, 1846; also, a certificate of the governor and secretary, of the ap-

proval on the 12th June by the departmental assembly, dated 14th June, 1846.

Some attempt was made to prove possession and occupation by Padilla before and since the date of the grant, which were denied by the government. The clear weight of the proof in the case is against any possession or occupation. The two witnesses in support of it, aside from Padilla, clearly confounded the possession of the ranch of Padilla, called the *Roblar de la Miseria*, with that of the *Bolsa de Tomales*, both of which are in the same section of country. Padilla states that he had possession of the land in 1844; built on it in that year; that he cultivated the land, and had cattle on it from that time until he sold it to Molena and Berreyesa, in the latter part of the year 1848, or beginning of the year 1849. In this he is expressly contradicted by some half a dozen witnesses, some of whom cannot be mistaken as to the facts. It appears, from the evidence, that Padilla, at the breaking out of the disturbances in the early part of 1846, adhered to the Mexican government, and was charged with having been concerned in killing some Americans in the fore part of that year; was pursued by an American force, and fled from that part of the country, and did not return until after the war. (See also the testimony of Padilla in the case of the claim of Josefa de Haro and others, No. 101, before the board of commissioners; and see his grant of *Roblar de la Miseria*, 25th November, 1845.)

* It is admitted that the original grant of the title in [* 96] form, which was in the hands of the claimants, has been altered so as to bear date the 12th February, instead of the 12th June, 1846. No explanation was given of the alteration, though it was apparent on the face of the paper.

The genuineness of the signature of the governor, Pio Pico, to the certificate of the approval of the departmental assembly, was doubted by the board of commissioners.

The board say, after alluding to the alteration of the date of the grant, "there are many things connected with the claim which, under the conclusion at which the commission has arrived, were not altogether satisfactory. The time when the grant was made, only a few days before the Americans took possession of the country, the evident and palpable attempt to alter the date so as to make it appear several months anterior to the time when it was issued, and the manifest want of similarity in the signatures of Pio Pico to the papers of approval, with the usual mode of signing his name, are circumstances which greatly detract from the good faith of the claim. The evidence, however, they say, makes out a *prima facie*

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case, which, in the absence of any rebutting testimony, entitles the petitioners to a decree of confirmation."

The court is of opinion that, in consideration of the doubtful character of the claim, and entire want of any merits upon the testimony, the decree of the court below should be reversed, and the case remitted for further evidence and examination.

THE BANK OF PITTSBURGH, Plaintiff in Error, v. JOHN S. NEAL and REUBEN E. NEAL.

22 H. 96.

BILLS OF EXCHANGE—FILLING BLANKS AFTER ACCEPTANCE.

Defendants, residing in Indiana, signed their name as acceptors to eight bills of exchange, which were blank as to date, amount, and names of drawer and payee, and sent them to Pittsburgh, to their correspondent, to have these blanks filled, and the drafts sold for the benefit of the defendants, which was done. Four of these drafts purported on their face to be first of exchange, and four to be second of exchange: Held, that notwithstanding these words, when their agent sold each draft thus accepted for value to a *bona fide* purchaser, the defendants were liable for the amount of each one of said drafts so accepted and sold.

WRIT of error to the circuit court for the district of Indiana. The case is fully stated in the opinion.

Mr. Stanton and *Mr. Walker*, for plaintiff in error.

Mr. Thompson and *Mr. Dunn*, for defendants.

[* 104] * Mr. Justice CLIFFORD delivered the opinion of the court.

This is a writ of error to the circuit court of the United States for the district of Indiana. All of the questions presented in this case arise upon the pleadings and the facts therein disclosed. It was an action of assumpsit, brought by the plaintiff in error as the holder of two certain bills of exchange, against the defendants as the acceptors. An amendment to the declaration was filed after the suit was commenced. As now exhibited in the transcript, it contains four counts. Two of the counts were drawn up on the respective bills of exchange, and are in the usual form of declaring in suits, by the holder of a bill of exchange against the acceptor. Those contained in the amendment are special in form, setting forth the circumstances under which the respective bills of exchange were drawn, accepted, and negotiated, and averring that

[* 105] these * acts were subsequently ratified by the defendants.

To the merits of the controversy the defendants pleaded

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the general issue, and filed seven special pleas in bar of the action. Demurrers were filed by the plaintiff to each of the special pleas, which were duly joined by the defendants, and after the hearing, the court overruled all of the demurrers. Those filed to the pleas responsive to the first and second counts were overruled upon the ground that the pleas were sufficient, and constituted a good bar to the action; but those filed to the fifth, sixth, seventh, and eighth pleas were overruled, upon the ground that the third and fourth counts, to which those pleas exclusively applied, were each insufficient in law to maintain the action. Whereupon, the plaintiff abiding his demurrers, the court directed that judgment be entered for the defendants, and the plaintiff sued out a writ of error, and removed the cause into this court. It being very properly admitted, by the counsel of the defendants, that the first and second counts of the declaration are in the usual form, it is not necessary to determine the question as to the sufficiency of the third and fourth, and we are the less inclined to do so, from the fact that the counsel on both sides expressed the wish, at the argument, that the decision of the cause might turn upon the question, whether the plaintiff, on the facts disclosed in the pleadings, was entitled to recover against the defendants. That question is the main one presented by the pleadings; and inasmuch as it might well have been tried under the general issue, we think it quite unnecessary to consider any of the incidental questions which do not touch the merits of the controversy. Special pleading in suits on bills of exchange and promissory notes ought not to be encouraged, except in cases where by law the defense would otherwise be excluded or rendered unavailing. Full and clear statements of the facts as disclosed in the pleadings, were presented to the court, at the argument, by the counsel on both sides. They are substantially as follows: In June, 1857, the defendants, residents of Madison, in the State of Indiana, being desirous of procuring a loan of money, made their certain acceptances in writing of two blank bills of exchange, in sets of two * parts to each bill, and transmitted the four [* 106] blanks, thus accepted, to their correspondent, Lot O. Reynolds, then and still residing at Pittsburgh, in the State of Pennsylvania. Both sets of blanks were in the form of printed blanks usually kept by merchants for bills of exchange in double sets, except that each of the four was made payable to the order of the correspondent, to whom they were sent, and was duly accepted on its face by the defendants, in the name of their firm. They were in blank as to the names of the drawers and the address of the drawees, and as to date, and amount, and time, and place of pay-

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ment. When the defendants forwarded the acceptances, they instructed their correspondent to perfect them as bills of exchange, by procuring the signatures of the requisite parties, as accommodation drawers and endorsers, and to fill up each with the appropriate date, and with sums not less than fifteen hundred nor more than three thousand dollars, payable at the longest period practicable, and to sell and negotiate the bills as perfected, for money, and remit the proceeds to the defendants. Afterwards, in the month of July, of the same year, the defendants, at the request of the person to whom those acceptances were sent, made four other similar acceptances, and delivered them to him, to be sold and negotiated as bills of exchange, in double sets, for his own use, and with power to retain and use the proceeds thereof for his own benefit. They were in all respects the same, in point of form, as the four acceptances first named, and, like those, each of the four parts was made payable to the order of the person at whose request they were given, and was duly accepted by the defendants in the name of their firm. When they delivered the sets last named, they authorized the payee to perfect them as bills of exchange, in two parts, in reasonable amounts, and with reasonable dates. Eight acceptances were thus delivered by the defendants to the same person, corresponding in point of form to four bills of exchange, but with blanks for the names of the drawers and the address of the drawees, and for the respective amounts, dates, and times and places of payment. Four contained, in the printed form of the blanks, the words, "first of exchange, second unpaid;" [* 107] and the other four contained in * the corresponding form the words, "second of exchange, first unpaid;" but in all other respects they were alike. All of the first class were perfected by the correspondent as bills of exchange of the first part, and were sold and negotiated by him at certain other banks in the city of Pittsburgh. He perfected them by procuring L. O. Reynolds & Son to become the drawers, addressed them to the defendants, endorsed them himself in blank, and procured another individual or firm to become the second endorser. They were filled up by him for sums varying from about two thousand to three thousand dollars, with dates corresponding to the times when they were negotiated, and were respectively made payable in four months from date. Contrary to his instructions, he retained the proceeds of the one first negotiated, which he had been directed to remit; and he also retained in his possession, but without inquiry or complaint on the part of the defendants, the other four acceptances, constituting the second class. On the first day of August, 1857, he perfected

and filled up as a separate bill of exchange one of the last-named acceptances, and sold and negotiated it to the plaintiff for his own use and benefit. He also perfected and filled up, on the eighteenth day of the same month, another of the same class, in the same manner, and for the same purpose, and on the same day sold and negotiated it to the plaintiff. Both of these last-mentioned bills of exchange vary from those of the first class, not only in dates and amounts, but also as to time and place of payment, and are in all respects single bills of exchange. They were each received and discounted by the plaintiff, without any knowledge whatever that either had been perfected and filled up by the payee without authority, or of the circumstances under which they had been intrusted to his care, unless the words, "second of exchange, first unpaid," can be held to have that import.

In all other respects, the bills must be viewed precisely as they would be if they had been perfected and filled up by the defendants, and for two reasons, deducible from the decisions of this court:

First. Because, where a party to a negotiable instrument * intrusts it to the custody of another with blanks not filled [* 108] up, whether it be for the purpose to accommodate the person to whom it was intrusted, or to be used for his own benefit, such negotiable instrument carries on its face an implied authority to fill up the blanks and perfect the instrument; and as between such a party and innocent third parties, the person to whom it was so intrusted must be deemed the agent of the party who committed such instrument to his custody—or, in other words, it is the act of the principal, and he is bound by it. *Goodman v. Simonds*, 20 How. 361; *Violet v. Patton*, 5 Cran. 142.

Secondly. Because a *bona fide* holder of a negotiable instrument, for a valuable consideration, without notice of the facts which impeach its validity between the antecedent parties, if he takes it under an endorsement made before the same becomes due, holds the title unaffected by these facts, and may recover thereon, although, as between the antecedent parties, the transaction may be without any legal validity. *Swift v. Tyson*, 16 Peters, 15; *Goodman v. Simonds*, 20 Howard, 363.

Applying these principles, it is obvious that the only question that arises on this branch of the case is as to the effect of the words, "second of exchange, first unpaid," which appear on the face of the bills. That question, under the circumstances of this case, is a question of law, and not of fact for the jury. Three decisions of this court sustain that proposition; and in view of that fact, we think it unnecessary to do more than refer to those decisions, with-

out further comment in its support. *Andrews v. Pond and al.*, 13 Pet. 5; *Fowler v. Brantly*, 14 Pet. 318; *Goodman v. Simonds*, 20 How. 366.

Another principle, firmly established by this court, and closely allied to the question under consideration, will serve very much to elucidate the present inquiry. In *Downes and al. v. Church*, 13 Pet. p. 207, this court held, that either of the set of bills of exchange may be presented for acceptance, and if not accepted, that a right of action presently arises, upon due notice, against all the antecedent parties to the bill, without any others of the [* 109] set being presented; for, say the * court, it is by no means necessary that all the parts should be presented for acceptance before a right of action accrues to the holder.

Now, if either of the set may be presented, and when not accepted a right of action immediately ensues, it is difficult to see any reason why, if upon presentation the bill is accepted, it is not competent for the endorsee to negotiate it in the market; and clearly, if the endorsee may properly negotiate the bill, a *bona fide* holder for value, without notice, may acquire a good title. In this connection, Mr. Chitty says, that "unless the drawee has accepted another part of a bill, he may safely pay any part that is presented to him, and that a payment of that part will annul the effect of the others; but if one of the parts has been accepted, the payment of another unaccepted part will not liberate the acceptor from liability to pay the holder of the accepted part, and such acceptor may therefore refuse to pay the bearer of the unaccepted part;" from which he deduces the rule, that a drawee of a bill drawn in sets should only accept one of the set. *Chitty on Bills*, (10 Am. ed. by Barb.) 155.

Mr. Byles says: "The drawee should accept only one part, for if two accepted parts should come into the hands of different holders, and the acceptor should pay one, it is possible that he may be obliged to pay the other part also;" which could not be, unless it was competent for the holder of a second part to negotiate it in the market. *Byles on Bills*, p. 310.

Where the drawee accepted and endorsed one part to a creditor, as a security, and afterwards accepted and endorsed another part for value to a third person, but subsequently substituted another security for the part first accepted, it was held, in *Holdsworth v. Hunter*, 10 Barn. and Cress. 449, that, under these circumstances, the holder of the part secondly accepted was entitled to recover on the bill; and Lord Tenterden and Baron Parke held that the acceptor would have been liable on the part secondly accepted, even if the first part had been endorsed and circulated unconditionally.

Judge Story says, in his work on bills of exchange, that the * *bona fide* holder of any one of the set, if accepted, [* 110] may recover the amount from the acceptor, who would not be bound to pay any other of the set which was held by another person, although he might be the first holder. Story on Bills, sec. 226.

No authority is cited, for the defendant, to impair the force of those already referred to; but it is not necessary to express any decided opinion upon the point at the present time. Suffice it to say, that in the absence of any authority to the contrary, we are strongly inclined to think that the correct rule is stated by Mr. Chitty, and that such is the general understanding among mercantile men.

But another answer may be given to the argument for the defendant, which is entirely conclusive against it; and that is, that the bills described in the first and second counts were not parts of sets of bills of exchange. They were perfected, filled up, and negotiated, by the correspondents, of the defendants, to whom the blank acceptances had been intrusted as single bills of exchange; and for the acts of their correspondent, in that behalf, the defendants are responsible to a *bona fide* holder for value, without notice that the acts were performed without authority.

When the transaction is thus viewed, as it must be in contemplation of law, it is clearly brought within the operation of the same rule as it would be if the defendant himself had improvidently accepted two bills for the same debt. In such cases, it is held, that the acceptor is liable to pay both, in the hands of innocent holders for value. Davidson v. Robertson, 3 Dow. P. C. 228.

Lord Eldon said, in that case: "Here were two bills for the same account, and supposed to be for the same sums; they who were to pay them had a right to complain that there were two, and yet they were bound to pay both, in the hands of *bona fide* holders, if accepted by them, or by others for them, having authority to accept."

To suppose, in this case, that the words "second of exchange, first unpaid," import knowledge to the plaintiff that the bills were drawn in sets, would be to give them an effect contrary to the averments of the defendants' pleas, as well as * con- [* 111] trary to the admitted fact that they were not so drawn; and for those reasons the theory cannot be sustained.

In view of all the facts as disclosed in the pleadings, we think the case clearly falls within the operation of the rule, generally applicable in cases of agency, that where one of two innocent par-

Insurance Co. of the Valley of Virginia v. Mordecai.

ties must suffer, through the fraud or negligence of a third party, the loss shall fall upon him who gave the credit. *Fitzherbert v. Mathen*, 1 Term. 16, per Buller; *Androscoggin Bank v. Kimball*, 10 Cush. 373; *Montague v. Perkins*, 22 Eng. L. and Eq. 516.

Business men who place their signatures to blanks, suitable for negotiable bills of exchange or promissory notes, and intrust them to their correspondents, to raise money at their discretion, ought to understand the operation and effect of this rule, and not to expect that courts of justice will fail in such cases to give it due application.

According to the views of this court, the demurrers to the several pleas filed to the first and second counts of the declaration should have been sustained. Having come to that conclusion, it is unnecessary to examine the other propositions submitted on behalf of the defendants.

The judgment of the circuit court is therefore reversed, with costs, and the cause remanded, with directions to enter judgment for the plaintiff, as upon demurrer, on the first and second counts of the declaration.

THE INSURANCE COMPANY OF THE VALLEY OF VIRGINIA, Plaintiffs in Error, v. MOSES C. MORDECAI.

22 H. 111.

INSURANCE OF FREIGHT FOR A ROUND VOYAGE WITH PORT OF DISCHARGE.

1. The language of the contract of insurance is that "Mordecai & Co. are insured on freight of barque Susan, hence to Rio Janeiro, and from thence to port of discharge in the United States." At Rio she took on a cargo for her return voyage, and started, and was compelled to put back to Rio, where she was condemned as unseaworthy: Held, that the contract was for insurance of all freight at risk at any time during the outward or return voyage, and covered the freight lost by the failure to complete the delivery of the return cargo.
2. That the question whether the policy was an open or valued policy, or whether the company was released by reason of the condemnation of the vessel, cannot be raised here, because they were not raised in the court below, so far as the record shows.

WRIT of error to the circuit court for the district of South Carolina. The case is sufficiently stated in the opinion of the court.

Mr. Robinson, for plaintiffs in error.

Mr. Phillips, for defendant.

* Mr. Justice NELSON delivered the opinion of the court. [* 116]

This is a writ of error to the circuit court of the United States for the district of South Carolina.

The suit was brought in the court below on a policy of insurance, for \$4,000, on the freight of the barque Susan, on a voyage from Charleston to Rio Janeiro, and from thence to a port of discharge in the United States.

The vessel sailed with a full cargo on the 11th June, 1855, when she was stanch and strong, and arrived at the port of Rio Janeiro, where she discharged her outward lading, and took in a return cargo, and on the 10th October, 1855, started on her return voyage, but was compelled, for want of strength and soundness, to put back to the port of departure, where she was condemned as unseaworthy, and sold, and the whole freight of the return voyage lost.

The counsel, upon this state of facts, which is all that appears * in the bill of exceptions, insisted that the policy [* 117] was an open one, and the insurers liable for only one thousand dollars; but the court instructed the jury that the agreement proved was for a valued policy.

The counsel then insisted, that the four thousand dollars having been insured on the round voyage, the insurers, from the evidence, were liable only for one-half the sum insured—the other half being covered by the freight of the outward voyage; but the court charged, that the loss of the freight on the return voyage was a total loss, and that, upon the case as it appeared, the plaintiff was entitled to the whole amount underwritten. To this last instruction, the counsel for defendants excepted.

The counsel for the plaintiff in error, on the argument, referred to the clause in the policy by which “it is also agreed, that if the above-named vessel, upon a regular survey, shall be declared unseaworthy, by reason of her being unsound or rotten, or incapable of prosecuting her voyage on account of her being unsound or rotten, then the assurers shall not be responsible on this policy;” and insisted that the condemnation of the vessel as unseaworthy, after returning back to the port of Rio Janeiro, brought the case within it.

But the answer to this position is, that no such question was made on the trial, or presented to the court for decision, and therefore cannot be entertained here; neither does the evidence in the case enable the counsel to raise any such question, as it does not appear that the condemnation proceeded from the causes specified in this clause of the policy. 7 Wh. 610; 10 *ib.* 418. It is enough, however, to say, that the question, for aught that appears in the bill of exceptions, was not raised on the trial.

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As it respects the question whether the policy was an open or valued one, no exception was taken to the ruling that it was a valued one. The point was not pressed, probably; as we see, from a memorandum of the agents of the company in the case, that it was intended by the agreement to be a valued policy.

The remaining question, and indeed the only one presented [* 118] in the bill of exceptions, is, whether the voyage insured is one entire voyage from Charleston to Rio Janeiro and back to the port of discharge in the United States, and consequently the underwriters entitled to a deduction of the freight earned on the outward voyage?

The court is of opinion, upon the true construction of the policy, the insurance was upon the freight of each successive voyage, and is to be applied to the freight at risk at any time, whether on the outward or homeward voyage, to the amount of the valuation.

The case, in this respect, is not distinguishable from *Hugg v. the Augusta Insurance and Banking Company*, (7 How. 595.) See, also, 3 Caines, 16; 7 Gill. and John. 293; 2 Phillips on Insurance, 31, 34.

Judgment of the court below affirmed.

WILLIAM BREWSTER, Appellant, v. WILLIAM WAKEFIELD.

22 H. 118.

PRACTICE ON APPEAL FROM TERRITORIAL COURTS—PARTIES TO MORTGAGE FORECLOSURE
—COMPUTATION OF INTEREST AFTER MATURITY.

1. Although, by the laws of the territory, all suits, whether of common law or equity cognizance, are carried from the lower court to the supreme court of the territory by writ of error, that does not affect the mode of removing them to this court; and as this case is essentially of an equitable character, it is properly brought here by appeal from the supreme court.
2. In a suit brought by a prior mortgagee to foreclose his mortgage, a subsequent mortgager is not a necessary party; and, if made parties, they need not join in the appeal when they did not appear, and the only matter in controversy was the amount of plaintiff's debt, which they did not contest.
3. Where a contract was for the payment of a sum of money at a given time, with interest at a specified rate, this rate of interest is limited by such a contract to the time the note or contract was to run before maturity.
4. After maturity, the rate of interest is governed by the statute or law of the State, and not by the contract.

APPEAL from the supreme court of the territory of Minnesota.
The case is fully stated in the opinion.

Mr. Stevens and *Mr. Brisbin*, for appellant.

Mr. Bradley, for appellee.

22 H. 118
L. ed 301
132 515

* Mr. Chief Justice TANEY delivered the opinion of the [* 125] court.

This case comes before the court upon appeal from the judgment of the supreme court of the territory of Minnesota, before its admission into the Union as a State.

It appears that a suit was instituted in the district court, in the county of Ramsey, by Wakefield, the appellee, against the appellant and others, in order to foreclose a mortgage made by the said Brewster and his wife, of certain lands, to secure the payment of three promissory notes mentioned in the proceedings. The notes are not set out in full in the transcript, but are stated by the complainant in his petition, or bill of complaint, to have been all given by Brewster on the 11th of July, 1854, whereby, in one of them, he promised to pay, twelve months after the date thereof, to the order of * Wakefield, the appellee, the [* 126] sum of five thousand five hundred and eighty-three dollars and twenty-five cents, with interest thereon at the rate of twenty per cent. per annum from the date thereof, for value received; and in another, promised to pay to the order of the said Wakefield the further sum of two thousand dollars, twelve months after the date thereof, with interest thereon at the rate of two per cent. per month from the date; and by a third one, promised to pay to the order of the said Wakefield, six months after date, the further sum of one thousand dollars, with interest at the rate of two per cent. per month. This last-mentioned note is admitted to have been paid, and these proceedings were instituted to recover the principal and interest due on the two first.

No defense appears to have been made by the appellant, and the notes were admitted to be due. But when the court was about to pass its decree for the sale of the mortgaged premises, and ascertain and determine the sum due, the appellant, by his counsel, appeared and objected to the allowance of more than the legal rate of interest (seven per cent.) after the notes became due and payable. Wakefield, on the contrary, claimed that interest should be allowed at the rate mentioned in the notes, up to the time of the judgment or decree for the sale. And of this opinion was the court, and by its decree, dated June 20th, 1855, adjudged that the sum of \$10,670.77 was then due and owing for principal and interest on the said two notes, and ordered the mortgaged premises, or so much thereof as might be necessary, to be sold to raise that sum.

This decree or judgment was carried by writ of error, according to the practice in the territory, before the supreme territorial court; and was there, on the 29th of January, 1857, affirmed, with ten

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per cent. damages, and also legal interest on the sum awarded by the district court, amounting altogether to the sum of twelve thousand five hundred and thirty-eight dollars and nine cents. For the payment of that amount, with costs, the mortgaged premises were ordered to be sold.

From this last-mentioned decision an appeal was taken to this court.

[* 127] * There is no question as to the validity of the notes or mortgage; and it is admitted that no part of the debt has been paid. The question in controversy between the parties is, whether, after the day specified for the payment of the notes, the interest is to be calculated at the rates therein mentioned, or according to the rate established by law, when there is no written contract on the subject between the parties. The question depends upon the construction of a statute of the territory, which is in the following words:

“Sec. 1. Any rate of interest agreed upon by the parties in contract, specifying the same in writing, shall be legal and valid.

“Sec. 2. When no rate of interest is agreed upon or specified in a note or other contract, seven per cent. per annum shall be the legal rate.”

Now, the notes which formed the written contracts between the parties, as we have already said, are not set out in full in the record. We must take them, therefore, as they are described by the complainant, as his description is not disputed by the appellant; and, according to that statement, the written stipulation as to interest, is interest from the date to the day specified for the payment. There is no stipulation in relation to interest, after the notes become due, in case the debtor should fail to pay them; and if the right to interest depended altogether on contract, and was not given by law in a case of this kind, the appellee would be entitled to no interest whatever after the day of payment.

The contract being entirely silent as to interest, if the notes should not be punctually paid, the creditor is entitled to interest after that time by operation of law, and not by any provision in the contract. And, in this view of the subject, we think the territorial courts committed an error in allowing, after the notes fell due, a higher rate of interest than that established by law, where there was no contract to regulate it. The cases of *Macomber v. Dunham*, 8 Wend. 550; *United States Bank v. Chapin*, 9 Wend. 471; and *Ludwick v. Huntsinger*, 5 Watts and Serg. 51, 60, were decided upon this principle, and, in the opinion of this [* 128] court, correctly decided. * Nor is there anything in the

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character of this contract that should induce the court, by supposed intendment of the parties or doubtful inferences, to extend the stipulation for interest beyond the time specified in the written contract. The law of Minnesota has fixed seven per cent. per annum as a reasonable and fair compensation for the use of money; and where a party desires to exact, from the necessities of a borrower, more than three times as much as the legislature deems reasonable and just, he must take care that the contract is so written, in plain and unambiguous terms; for, with such a claim, he must stand upon his bond.

A question has been raised by the appellee, as to the jurisdiction of this court. The laws of the territory have abolished the distinction between cases at law and cases in equity, and both are blended in the same proceeding, without any regard to the forms and rules of proceeding, either at law or in equity, and a case cannot be removed from an inferior to an appellate territorial court, except by writ of error. And it is urged that this case, under the laws of Minnesota, ought to be regarded as a case at law, and removable to this court by writ only, and not by appeal.

But the case presented by the record is not a case at law, according to the meaning of those words, in courts which recognize the distinction between law and equity. On the contrary, it is a proceeding in the nature of a bill in equity to foreclose a mortgage, in which the facts as well as the law are to be decided by the court; and an appeal, and not a writ of error, was the appropriate mode of bringing the case before this court. The laws or practice of the territory cannot regulate the process by which this court exercises its appellate power. Nor, indeed, can there be any such thing as a suit at law, as contradistinguished from a suit in equity, in the courts of the territory, where legal rights and equitable rights must be blended together and prosecuted in the same suit, without any regard to the rules and practice of courts of common law or courts of equity.

Nor was it necessary that the parties who acquired liens on the mortgaged premises subsequent to the mortgage in question should join in the appeal. They were not necessary [* 129] parties in a proceeding in equity to foreclose the mortgage, and none of them have appeared to the suit to contest the claim of Wakefield. And if it had been otherwise, yet the question in controversy here is the amount of the debt due from the appellant; and in the case of *Forgay v. Conrad*, 6 How. 201, this court decided that a defendant in equity, whose interest is separate from that of the other defendants, may appeal without them.

Steamer Capitol.

We have no doubt of the jurisdiction of the court upon this appeal; and the judgment and decree of the supreme court of the territory must be reversed, for the error above mentioned.

STEAMER CAPITOL.

BRYAN ROACH and DENNIS LONG, Appellants, *v.* WILLIAM CHAPMAN and others.

22 H. 129.

ADMIRALTY—FURNISHING ENGINES FOR A NEW SHIP NOT A MARITIME CONTRACT.

1. Building a ship, supplying engines or furnishing timber for her, is not a maritime contract. *People's Ferry Co. v. Beers*, 20 H. 400, 2 Miller, 489, reaffirmed.
2. The district courts of the United States, therefore, have no jurisdiction of such a contract; nor can a State statute giving a lien on the vessel in such case give jurisdiction in the federal court.

APPEAL from the circuit court for the eastern district of Louisiana.

Roach & Long, residing in Kentucky, libeled the steamer Capitol in the district court for the eastern district of Louisiana, for part of the price of the engines and boilers furnished the steamer at Louisville, claiming both under the general admiralty law and a statute of Kentucky.

The district court decreed for libelants, and the circuit court reversed that decree, from which last case the appeal is taken.

Mr. Benjamin, for appellants.

No counsel for appellees.

[* 131] * Mr. Justice GRIER delivered the opinion of the court.

The libelants claim to have a lien on the steamboat Capitol, for a balance due them for machinery furnished in her construction. The boat was built at Louisville, Kentucky, and the libelants furnished the boilers and engines. Payments were made as the work progressed, and bills of exchange taken for the balance due after the vessel was completed. These were not paid.

[* 132] The boat left the port and the State, * and was afterwards sold, and became the property of the claimants.

Among other things, the claimants pleaded to the jurisdiction of the court. This plea was sustained by the circuit court.

A contract for building a ship or supplying engines, timber, or other materials for her construction, is clearly not a maritime contract.

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Any former dicta or decisions which seemed to favor a contrary doctrine were overruled by this court, in the case of the People's Ferry Co. v. Beers, (20 How. 400.)

It is said here, that the law of Kentucky creates a lien in favor of the libelants; and that, as this case originated before the adoption of our rule, which took effect on the first of May, 1859, it may, upon the principles recognized by this court in *Peyroux v. Howard*, (7 Peters, 343,) be enforced in the admiralty. But (to quote the language of the court in *Orleans v. Phoebus*, 11 How. 184) "that decision does not authorize any such conclusion. In that case, the repairs of the vessel, for which the State laws created a lien, were made at New Orleans, on tide waters. The contract was treated as a maritime contract, and the lien under the State laws was enforced in admiralty, upon the ground that the court, under such circumstances, had jurisdiction of the contract, as maritime; and then the lien, being attached to it, might be enforced according to the mode of administering remedies in the admiralty. The local laws can never confer jurisdiction on the courts of the United States."

It is clear, therefore, that the judgment of the circuit court, dismissing the libel for want of jurisdiction, must be affirmed, without noticing other questions raised by the pleadings.

THOMAS O. LEROY and DAVID SMITH, Appellants, v. BENJAMIN TATHAM and others.

22 H. 132.

PATENT LAW.

The patent of Tatham, which was considered in this court in *Levy v. Tatham*, 14 H. 136, again reviewed and explained, and held to be valid, as describing a new combination of machinery, and the application of it to a newly-discovered property in lead, by which a new and useful result is produced.

APPEAL from the circuit court for the southern district of New York. The case is stated in the opinion of the court.

Mr. Stoughton and Mr. Noyes, for appellants.

Mr. Keller and Mr. Goddard, for appellees.

* Mr. Justice McLEAN delivered the opinion of the court. [* 134]

This is an appeal from the final decree of the circuit court of the United States for the southern district of New York, on a bill

LeRoy v. Tatham.

filed by the appellees to restrain the infringement by the appellants of a patent for making lead pipe, and for general relief.

A suit at law was commenced, after the filing of the bill, on or about the 10th of May, 1847, to recover damages for the same infringement.

This action was twice tried—once on the 3d May, 1848, and resulted in a verdict for the appellants, which was set aside by the court, and a new trial awarded. It was tried in May, 1849, when the jury gave a verdict for the respondents for \$11,394 in damages. Exceptions were taken to the charge, and the judgment was reversed, and a new trial ordered in December term, 1852. 14 How. 156.

Before this decision was made, and in January, 1852, it was stipulated between the counsel for the respective parties that the testimony taken on the last trial in the action at law should be read; and it forms the principal part of the evidence on both sides in this suit.

The action at law was not to be tried again; but the suit in equity was prosecuted in its stead.

The patent under which the plaintiffs claim bears date the 14th March, 1846; and in their schedule they say: "Our invention consists in certain improvements upon and additions to the machinery used for manufacturing pipes and tubes from lead or tin, or any alloy of soft metals, capable of being forced, by great pressure, from out of a receiver, through or between apertures, dies, and cores, when in a set or solid state, set forth in the specification of a patent granted to Thomas Burr, of Shrewsbury, in Shropshire, England, dated the 11th of April, 1820, recited in the Repertory of Arts, &c., London, &c."

The bill alleges that John and Charles Hanson, of England, were the inventors of the improvements specified, on or [* 135] prior * to the 31st of August, 1837; that on the 10th of January, 1840, the Hansons assigned to H. B. & B. Tatham, two of the defendants in error, the full and exclusive right to said improvements; that on the 29th March, 1841, letters patent were granted for the improvements to the Tathams, as the assignees of the Hansons; that afterwards H. B. & B. Tatham, assigned to G. N. Tatham, the remaining defendant, an undivided third part of the patent.

On the 14th March, 1846, the said letters patent were surrendered, on the ground that the specifications of the improvements claimed were defective; and a new patent was issued, which granted to the patentees, their heirs, &c, for the term of fourteen years from

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the 31st August, 1837, the exclusive right to make and vend the improvements secured.

The defendants denied the infringement charged.

A great number of facts were proved, showing the successful manufacture of lead in the mode stated in the specifications, and particularly that "pipes thus made are found to possess great solidity and unusual strength, and a fine uniformity of thickness and accuracy is arrived at, such as, it is believed, has never been attained by any other machinery." And they say the essential difference in the character of this pipe, which distinguishes it, as well as that contemplated by Thomas Burr, from all others heretofore known or attempted, is, that it is wrought under heat, by pressure and constriction, from set metal, and that it is not a casting formed in a mould.

"And it was proved, that in all the modes of making lead pipe previously known and in use, it could be made only in short pieces; but that, by this improved mode, it could be made of any required length, and also of any size; and that the introduction of lead pipe made in the mode described had superseded the use of that made by any of the modes before in use, and that it was furnished at a less price." And it was proved that lead, when recently become set, and while under heat and extreme pressure, in a close vessel, would reunite perfectly after a separation of its parts.

In the case of the Househill Company v. Neilson, Webster's Patent Cases, 683, it is said: "A patent will be good, though * the subject of the patent consists in the discovery [* 136] of a great, general, and most comprehensive principle in science or law of nature, if that principle is, by the specification, applied to any special purpose, so as thereby to effectuate a practical result and benefit not previously attained."

Mr. Justice Clerk Hope, in his charge to the jury, said: "The specification does not claim anything as to the form, nature, shape, materials, numbers, or mathematical character, of the vessel or vessels in which the air is to be heated, or as to the mode of heating such vessels."

Now, in this case it must not be forgotten that the machinery was not claimed as a part of the invention; but the jury were instructed to inquire "whether the specification was not such as to enable workmen of ordinary skill to make machinery or apparatus capable of producing the effect set forth in said letters patent and specification;" and that, in order to ascertain whether the defendants had infringed the patent, the jury should inquire whether they "did, by themselves or others, and in contravention of the privi-

leges conferred by the letters patent, use machinery or apparatus substantially the same with the machinery or apparatus described in the plaintiffs' specification, and to the effect set forth in said letters and specification."

Now, as no specification was claimed in regard to the machinery, it is not perceived how the patent could be infringed, unless upon the principle that, having claimed no specific mode of applying the heat, he could use any mode he might prefer, in defiance of the rights of other patentees.

Now, this cannot be law; certainly it is not law under the patent act of this country. That act requires the making and constructing "the thing, in such full, clear, and exact terms as to enable any person, skilled in the art or science to which it appertains, to make, construct, and use the same."

Alderson B. Webster's Patent Cases, 342, says: "The distinction between a patent for a principle and a patent which can be supported is, that you must have an embodiment of the principle in some practical mode described in the specification of [* 137] carrying into actual effect; and then you take out * your patent, not for the principle, but for the mode of carrying the principle into effect."

"It is quite true, that a patent cannot be taken out solely for an abstract philosophical principle—for instance, for any law of nature or any matter of property, apart from any mode of turning it to account. A mere discovery of such a principle is not an invention, in the patent-law sense of the term." Web. Cases, 683.

However brilliant the discovery of the new principle may be, to make it useful it must be applied to some practical purpose. Short of this, no patent can be granted. And it would not seem to be a work of much labor for a man of ingenuity to describe what he has invented.

The "newly-discovered property in the metal, and the practical adaptation of it, by these means, to the production of a new result, namely, the manufacture of wrought pipe out of solid lead," was the discovery. "There can be no patent for a principle; but for a principle so far embodied and connected with corporal substances as to be in a condition to act and to produce effects in any trade, mystery, or manual occupation, there may be a patent."

"It is not that the patentee conceived an abstract notion that the consumption in fire-engines may be lessened; but he discovered a practical manner of doing it, and for that he has taken his patent. This is a very different thing from taking a patent for a principle."

The principle may be the new and valuable discovery, but the

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practical application of it to some useful purpose is the test of its value.

In the case of *Leroy v. Tatham*, 14 How. 136, it was said, "that in the view taken by the court in the construction of the patent, it was not material whether the mere combination of machinery referred to were similar to the combination used by the Hansons, because the originality did not consist in the novelty in the machinery, but in bringing a newly-discovered principle into practical application, by which a useful article is produced, and wrought pipe made, as distinguished from cast pipe."

* Now, it must be observed that the machinery used [* 138] was admitted to be old, and any difference in form and strength must arise from the mode of manufacturing the pipes. The new property in the metal claimed to have been discovered by the patentees belongs to the process of manufacture. The result is before us. We see the manufactured article, and are told that its substance is greatly modified and improved, but we derive little or no knowledge from inspecting it. Except by the known process of its formation, we cannot appreciate its value, or comprehend the various purposes for which it was made. We want to see and understand the processes by which it was formed, the machinery in action, and a full explanation of its parts.

The claimants say: "We wish it to be understood that we do not confine ourselves to the mode of operation herein described, by making the cylinder rise with the hydraulic ram and other parts, and keeping the piston stationary, as the same effects will take place when the cylinder is stationary, and the power of the ram is applied to the top of the piston to cause it to descend into the cylinder, and our improvements might be applied to a cylinder and press, fitted up in other respects upon Burr's plans, whereby the pipe is received over the top of the machinery, &c., all which and other variations will readily suggest themselves to any practical engineer, without departing from the substantial originality of our invention.

"The combinations of the following parts above described is claimed, to wit, the core and bridge, or guide-piece, with the cylinder, the piston, the chamber, and the die, when used to form pipes of metal, under heat and pressure, in the manner set forth, or in any other mode substantially the same."

To the above is added: "We do not claim as our invention and improvement any of the parts of the above-described machinery, independently of their arrangement and combination above set forth."

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The machinery described in both the above sentences is only claimed when used to form pipes of metal under heat and pressure. And it must be admitted, that the machinery described and illustrated by the drawings is sufficiently explicit to [* 139] show *the nature of the invention. If it be admitted that the machinery, or a part of it, was not new when used to produce the new product, still it was so combined and modified as to produce new results, within the patent law. One new and operative agency in the production of the decided result would give novelty to the entire combination.

The specifications are drawn with care and no ordinary skill, and they cannot be misunderstood. No one can be supposed to mistake the new product for the machinery through which it is developed. And in regard to a practical application of the new conception, it is as necessary as the conception itself; and they must unite in the patent. "The apparatus described is properly regarded by the patentees as subordinate, and as important only as enabling them to give practical effect to the newly-discovered property, by which they produce the new manufacture." Certainly no comparison was instituted between the mechanical contrivance used, and the new discovery.

In the case of *Leroy v. Tatham*, 14 Howard, 176, the court instructed the jury, "that the originality of the invention did not consist in the novelty of the machinery, but in bringing a newly-discovered principle into practical use."

Principle is often applied to a machine to describe its movements and effect; and we are told that the originality of this invention did not "consist in the novelty of the machinery, but in bringing a newly-discovered principle into practical effect." Whether the new manufacture was the result of frequent experiments or of accident, it will be admitted that the process has been demonstrated to the satisfaction of all observers; and this has been done in the mode described.

In the complicated and powerful machinery used to produce this result, it is not perceived why it should not be adverted to, as showing the most natural and satisfactory explanation of the discovery. It is only necessary to examine the machinery combined, to see that its parts are dissimilar to others in use; and there would seem to be no other reason for the use of the new principle, to the exclusion of the mechanical structures employed, [* 140] except a higher reach of knowledge. *However this may be, it would seem that, when dealing with a patentable subject, its appropriate name should be given to the machin-

ery by which it was developed. The admitted want of novelty in the machinery referred to so frequently, might invite criticism, if it were necessary, to the case in 14th Howard; but the case now before us is in chancery, and has been deliberately considered.

Up to the year 1837, the date of Hanson's invention, two methods only were known of making wrought pipe from lead, in the set or solid state, and these were the Burr method and the draw-bench method. As soon as the plan of the Hansons was introduced, they superseded all other methods.

Both of the above methods were defective—the draw-bench on account of the great labor, limited length of pipe produced, and unequal thickness; and the Burr, because of the difficulty of holding the core central in the die, in forming pipes of small calibre.

The superiority of the Burr method, for the general purposes of manufacturing leaden pipes which require different sizes to be made, was so slight, as it seems, that for seventeen years after the date of the Burr patent, not one of such machines was put in use in the United States or in Europe.

In this combination of machinery there are six essential parts :

First. A metal cylinder, capable of receiving the lead in a fluid state, and permitting it to become set or solid therein, and of great strength.

Second. A piston, which is a solid metallic body, fitted to the bore of the cylinder, to work therein accurately, to prevent the charge of lead from escaping around it, and so connected with a hydraulic press, or other motor of great power, as to traverse the length of the cylinder with a force applied of several tons, to force out the charge of lead not in the liquid state.

Third. A die, which is simply a block of steel, with a central hole of a cylindrical form, and of a diameter of the pipe to be made.

Fourth. A core, which is simply a short cylindrical rod of steel, of the diameter of the calibre of the pipe to be made.

* Fifth. A bridge or core-holder, which is a plate of [* 141] metal with apertures, having four or more arms radiating from the central part, which has a central hole of the size of the core.

Sixth. A chamber of construction, located between the bridge and the die, and extending from the one to the other, and either conical or cylindrical, provided the end next the bridge be made of greater diameter than the die.

It is rare that so clear and satisfactory an explanation is given to the machinery which performs the important functions above speci-

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fied. We are satisfied that the patent is sustainable, and that the complainants are entitled to the relief claimed by them.

Order.

The cause came on to be heard on the transcript of the record from the circuit court of the United States for the southern district of New York, and was argued by counsel; on consideration whereof, it is the opinion of this court that the complainants in the court below are entitled to recover from the defendants the sum of \$16,815.57. Whereupon, it is now here ordered, adjudged, and decreed, by this court, that the same is hereby affirmed to the extent of the aforesaid sum of \$16,815.57, and that it be reversed as to the residue; and that this cause be, and the same is hereby, remanded to the said circuit court, with directions to enter a decree for that amount in favor of the complainants. And it is further ordered and decreed by this court, that the costs in the court below be paid by respondents in that court, the appellants here, and that each party pay his own costs in this court.

THE CITY OF NEW ORLEANS, Plaintiff in Error, v. MYRA CLARK GAINES.

22 H. 141.

PRACTICE IN LOUISIANA CASES.

1. Where the record of a case shows that it was submitted to the court without a jury, and there are no facts found by the court, nor any bill of exceptions, this court can do nothing but affirm the judgment.
2. Copies of documents and records of a former suit attached to the answer cannot be considered here, as there is nothing to show that they were offered in record in the court below.

WRIT of error to the circuit court for the eastern district of Louisiana. The case is sufficiently stated in the opinion of the court.

Mr. Benjamin, for plaintiff in error.

Mr. Phillips and *Mr. Perin*, for defendant.

[* 143] * Mr. Justice CATRON delivered the opinion of the court.

The city of New Orleans instituted proceedings by suit in a city court, pursuant to a statute of Louisiana, for opening two streets in the city, and appropriating the private property requisite for that purpose; and on the tableau of assessment, certain squares of ground were put down as belonging to Mrs. Gaines, and the damages done to owner fixed at \$2,363.

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The assessment was decreed to Mrs. Gaines by the court where the proceeding was had; and she brought suit on this judgment against the city, in the United States circuit court.

The defendant, (the city,) by its answer, admitted the proceeding, and the damages assessed on the property described in the petition; but, in avoidance of the demand, averred that a suit had been brought by one Durell against the city, claiming that he was the true owner of the property through which the streets run, and which the commissioners of assessment had supposed to be owned by Mrs. Gaines, and demanding payment to him of the damages claimed by her; that in the suit so brought by Durell, Mrs. Gaines had been personally cited as a party, at the instance of the city, for the purpose of having the question decided between her and Durell, as to the ownership of the property, and as to their respective claims on the city for the sum awarded; and that in said suit judgment was rendered, determining the question in favor of Durell; and this judgment is pleaded in bar of the present suit.

Various documents were exhibited with the answer, and filed in the circuit court, on behalf of the city, including a record of the suit by Durell against the city, and the recovery * of [* 144] the damages for extending the streets; but nothing appears in the record showing that those documents were given in evidence on the trial; nor did the judge before whom the cause was heard make any statement of the facts found by him, as the usual practice is, where the circuit court in Louisiana tries issues of fact without the intervention of a jury.

The cause as presented to us simply shows a judgment in Mrs. Gaines's favor, with regular pleadings to warrant it; and beyond this, contains nothing that this court can notice, as a court of error.

It is ordered that the judgment below be affirmed.

JOHN C. HALE, Plaintiff in Error, *v.* WILLIAM H. GAINES and others.

22 H. 144.

JURISDICTION OVER JUDGMENTS OF STATE COURTS—EJECTMENT—TITLE TO HOT SPRINGS, ARKANSAS.

Gaines, plaintiff in court below, claimed title in ejectment under pre-emption allowed by land officers. Hale, defendant, claimed under an offer to locate a New Madrid certificate, which the land officer refused to allow: Held,

1. That the New Madrid certificate could not be located on the land in 1818, because it was not surveyed and open to entry; nor in 1838, because the right to locate on lands in Arkansas expired in 1823 by act of congress.
2. That inasmuch as the State court, in deciding that the pre-emption entry of plaintiff

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below was not valid, decided in favor of a right claimed under the authority of the register and receiver acts, the plaintiff in error cannot question that judgment in this court.

- 3 A prior pre-emption set up as an outstanding title is void, because the lands were reserved by act of congress from sale and pre-emption.

THIS is a writ of error to the supreme court of the State of Arkansas. The case is well stated in the opinion of the court.

Mr. F. P. Stanton, for plaintiff in error.

Mr. Watkins, Mr. May, and Mr. Brent, for defendants.

[* 157] * Mr. Justice CATRON delivered the opinion of the court.

A contest for the ownership of the Hot Springs, in Arkansas, has been pending for some years before the general
[* 158] land * office, and in the courts of that State. One party derive their title through a pre-emption claim, as an occupant under the acts of congress of 1830 and 1832, and the other by the location of a New Madrid warrant on the same land.

In December, 1851, the heirs of Belding were allowed to enter the quarter section, including the springs. This entry was held to be valid by the State courts, and to clothe them with a sufficient legal title to sustain an action of ejectment, according to the laws of Arkansas. They held the decision of the register and receiver, in favor of the occupant claimants, to be conclusive evidence of title, as against all persons who could not show a better opposing claim.

As between the titles of the United States and Belding's heirs, the State courts did not decide; but only, that the outstanding title in the United States could not be relied on by the defendant in this action; nor is the validity of the entry of Belding's heirs drawn in question in this court.

The defendant relied on a survey made in June, 1838, founded on a New Madrid certificate for 200 arpens.

To support this survey, an application was produced, dated 27th January, 1819, signed by S. Hammond and Elias Rector, addressed to William Rector, surveyor of the public lands, &c., asking to have surveyed and to be allowed to enter the recorder's certificate for 200 arpens, granted by him to Francis Langlois, or his legal representatives, and dated the 26th November, 1818, (No. 467.) The survey to be made in a square tract; the lines to correspond to the cardinal points, and to include the Hot Springs in the centre. In 1818, the spring was in the Indian country, to which, of course, no public surveys extended. And as the act of 1815, providing for

the New Madrid sufferers, only allowed them to enter their warrants on lands "the sale of which was authorized by law," the unsurveyed lands could not be legally appropriated; and, of necessity, the surveyor general disregarded the application to have a survey made for Langlois. And thus the claim stood from 1818 to 1838.

The defendant offered in evidence the certificate of a private survey of the claim of Langlois, made by James S. Conway,

* D. S., dated July 16th, 1820, which includes the spring. [* 159] This paper the court also rejected.

Until the survey on Langlois's claim was presented to the recorder of land titles at St. Louis, and recognized by him as proper and valid, it could have no force, as this was the only mode of location contemplated by the act of 1815. So it has been uniformly held. *Bagnell v. Broderick*, 13 Peters, 436; *Lessure v. Price*, 12 Howard, 9.

The act of April 26th, 1822, validated locations of New Madrid certificates then existing, and which had been made in advance of the public surveys; but the second section of the act declared that future locations should conform to the public surveys, and that all such warrants should be located within *one year* after the passage of that act.

As the public surveys then existing in Missouri and Arkansas territory were open to satisfy these claims, there was no difficulty in complying with the act of 1822.

Reliance is placed on the act of congress of March, 1843, to maintain the survey of 1838, of the New Madrid certificate. That act provides, that locations before that time made on New Madrid warrants, on the south side of Arkansas river, if made in pursuance of the act of 1815 *in other respects*, shall be perfected into grants, in like manner as if the Indian title to the lands on the south side of the river had been completely extinguished at the time of the passage of said act of 1815. The act of 1843 does not apply to the survey and location of Langlois made in 1838, for several reasons:

1. The sale of the land thus surveyed was not authorized by law; the act of April 20th, 1832, having reserved from location or sale the Hot Springs, and four sections of land including them as their centre.

The attempted location was void, because barred by the act of 26th April, 1822, which act was not repealed or modified by the act of 1843. This act referred to locations made on the south of the river Arkansas, of lands regularly surveyed and subject to sale, and which locations had been made on or before the 26th April, 1823, when the bar was interposed.

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We are of the opinion that the New Madrid survey [* 160] of 1838 * was altogether invalid, and properly rejected by the State courts.

It has been earnestly pressed on our consideration, that the entry of Belding's heirs is also void, because the land it covers was not subject to entry by an occupant claimant, or any one else, after the act of April 20th, 1832, had reserved it from sale.

Admitting it to be true, that the act of April, 1832, was passed when no individual claimant had a vested right to enter the land in dispute, still the 25th section of the judiciary act only gives jurisdiction to this court in cases where the decision of the State court draws in question the validity of an authority exercised under the United States, and the decision is *against* its validity. Here, however, the decision was in favor of the defendant's entry, and sustained the authority exercised by the department of public lands, in allowing Belding's heirs to purchase. Moreover, the plaintiff in error is not in a condition to draw in question the validity of Belding's entry. He relies on an outstanding title in the United States to defeat the action. Being a trespasser, without title in himself, he cannot be heard to set up such title. "To give jurisdiction to this court, the party must claim for himself, and not for a third person, in whose title he has no interest." *Henderson v. Tennessee*, 10 How. 323. The plaintiff in error must claim (for himself) some title, right, privilege, or exemption, under an act of congress, &c., and the decision must be *against* his claim, to give this court jurisdiction. Setting up a title in the United States, by way of defense, is not claiming a personal interest affecting the subject in litigation. This is the established construction of the 25th section of the judiciary act. *Montgomery v. Hernandis*, 12 Whea. 132.

If it was allowed to rely on the United States title in this instance, the right might be decided against the government, where it was no party, and had not been heard.

A claim is set up in defense, that John Percifull was entitled to a preference of entry under the act of 1814; which act, it is insisted, was revived by that of 1843, section 3. Suppose [* 161] * that Percifull's right to appropriate the land in dispute was undoubted, and that the register and receiver had allowed the heirs of Belding to enter wrongfully; still, the courts of Arkansas, in this action of ejectment, had no right to interfere, and set up Percifull's rejected claim.

But this is of little consequence, as, when the act of April, 1832, was passed, reserving the Hot Springs from sale, Percifull had no

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vested interest in the land that a court of justice could recognize. Then, the United States government was the legal owner, and had the power to reserve it from sale; so that the offer to purchase in 1851, under the assumed preference to entry claimed for Percifull, was inadmissible. Had the entry been allowed, in face of the act of Congress, such proceeding would have been merely void.

These being the only questions within our jurisdiction worthy of consideration in the causes Nos. 15, 16, 17, 18, and 19, it is ordered that the respective judgments rendered therein by the supreme court of Arkansas be affirmed.

JUAN JOSE GONZALES, Appellant, v. THE UNITED STATES.

22 H. 161.

CALIFORNIA LAND GRANTS.

Where the grant gives specific boundaries, and also states that the grant is one league in length and three quarters in breadth, a little more or less, also speaking of the surplus to be left to the nation, the concession is confirmed for the *quantity* mentioned inside the boundaries described.

APPEAL from the district court for the northern district of California. The case is fully stated in the opinion.

Mr. Hepburn and Mr. V. E. Howard, for appellant.

Mr. Stanton, for the United States.

* Mr. Justice McLEAN delivered the opinion of the court. [* 165]

This is an appeal from the district court of the United States for the northern district of California.

[Translation of Title.]

Provisionally authorized by the administration of the maritime custom-house of Monterey, for the years 1832 and 1833.

Jose Figueroa, general of brigade of the national armies of Mexico, commander general, inspector, and superior political chief of Upper California.

Whereas Juan Jose Gonzales, a Mexican by birth, has, for his own personal benefit and that of his family, petitioned for the land known by the name of San Antonio, or El Pescadero, bounded by the rancho Antonio Buelnos Sierra, the coast, and the Arroyo of Butano, the proper measures and examinations being previous made, as required by laws and regulations, using the powers wh

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are conferred on me in decree of the seventh of this month, in the name of the Mexican nation, I have granted him the aforesaid land, declaring to him the ownership of it by these presents—said grant being understood to be in entire conformity with the provisions of the laws, subject to the approval or disapproval of the most excellent territorial deputation and of the supreme government, under the following conditions:

1. That he will submit to those which may be established by the regulation which is to be made for the distribution of vacant lands; and, in the meantime, neither the grantee nor his heirs can divide or alienate that which is granted to them, subject to any tax, entail, pledge, mortgage, or other encumbrance, even for pious purposes, nor convey it in mortmain.

2. He may enclose it, without prejudice to the crossings, roads, and servitudes; he will enjoy it freely and exclusively, [* 166] * making such use or cultivation of it as may best suit; but within one year, at furthest, he shall build a house, and it shall be inhabited.

3. When the ownership is confirmed to him, he will request the proper magistrate to give him juridical possession in virtue of this title, by whom the boundaries will be marked out—in which, besides the bounds, he will place some fruit or forest trees, of a useful character.

4. The land of which donation is made him is one league in length by three-quarters of a league in breadth, a little more or less, as shown by the map which goes in the expediente; the magistrate who may give the possession will cause it to be in conformity with the ordinance, in order to mark out the boundaries, leaving the surplus which may result to the nation, for its convenient uses.

5. If he contravene these conditions, he will lose his right to the land, and it will be subject to denouncement by another person.

In consequence I order, that the present serving him for a title, and being held as firm and valid, note be made of it in the corresponding book, and it be delivered to the person interested.

Given in Monterey, on the 24th December, 1833.

JOSE FIGUEROA.

(Signed) AGUSTIN V. ZAMORANO, *Sec'y*.

OFFICE OF THE SURVEYOR GENERAL OF THE
UNITED STATES FOR CALIFORNIA.

Samuel D. King, surveyor general, &c., and as such now having in my office and under my custody a portion of the archives of the former Spanish and Mexican territory or department of Upper

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California, do hereby certify that the fifteen preceding and hereunto annexed pages of tracing paper, numbered from one to —, inclusive, and each of which is verified by my initials, (S. D. K.,) exhibit true and accurate copies of certain documents on file and forming part of the said archives in this office.

In testimony whereof, &c.

*[Translation of Expediente.]

[* 167]

Provisionally authorized by the maritime custom-house of Monterey, for the years one thousand eight hundred and thirty-three and 1834.

(Signed)

FIGUEROA.

(Signed)

JOSE RAFAEL GONZALES.

To his Excellency the Commanding General:

I, citizen Juan Jose Gonzales, native of the mission of Santa Cruz, resident of the town of Branciforte, residing and employed in said mission of Santa Cruz, and mayor domo of the same; married, with a family of thirteen persons; having served the nation eight years and two months as a soldier, and having obtained my discharge from his excellency the commanding general Don Manuel Victoria, with the condition of furnishing a recruit, which I did at my own expense; and finding myself with 500 head of large cattle, and having no land or place to settle on; tired of the trouble of being together in the same village where I have been, and am unable to progress, on account of the same; living where I have rated a great loss in the stock which I have placed twelve years ago; and being now actually favored by the same mission of Santa Cruz, where my deceased father sacrificed himself for twenty years, and where I served in his place, the salaries of this post rent in the same mission, (Friar Antonio Real,) satisfied with my services and those of my deceased father, has wished to favor me, by assigning to me the rancho of San Antonio, formerly El Pescadero Realengo, which is not occupied by said mission, is distant twelve leagues to the northwest, bounded by the rancho of San Gregoria, which place——delineated on the accompanying paper, including a square of about four leagues, extending from the coast to the sierra, and from the rancho of San Gregoria (rancho occupied by citizen Antonio Buelna to the rancho of La Punta de Nuevo, which is the further occupied by the mission, and desiring a security or guaranty in the same place, I apply, with the consent of the minister, to your excellency, with the due respect, praying that you will be pleased to give me in possession the aforesaid place, in consideration of my family, and which will *confer [* 168]

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favor and grace on your most attached subject and servant, who wishes you many years of life, &c. JUAN GONZALES.

SANTA CRUZ, *November 26, 1833.*

MONTEREY, *November 29, 1833.*

In conformity with the laws on the matter, let the ayuntamiento of the town of Branciforte report whether the person interested in this petition possesses the requisites to the——attended to in his petition; whether the land he asked is included in the 20 leagues from the boundary, or 10 from the sea shore, referred to in the law of August, 1824; if it is irrigable, dependent on the seasons or pasture of land; if it belongs to the ownership of any private individual, corporation of pueblo, with everything else which may be proper to explain the matter.

This being concluded, it will pass this expediente to the reverend father minister of the mission of Santa Cruz, that he may report what he knows on the matter. Senor Don Jose Figueroa, general of brigade and commandant, inspector general, and superior political chief of the territory, thus ordered, decreed, and signed; to which I certify. FIGUEROA.

AGUSTIN V. ZAMORANO, *Sec'y.*

In compliance with your excellency's —— to this ayuntamiento, under your command in the decree of November 29th, 1833, to report whether the person interested in this petition possesses the requisites to be attended to in his request, and if the land he asks for be included in those referred to in the law:

The land asked for by the person interested in this petition may now be granted to him, for he has all the circumstances required to be attended to, and is entitled to it.

It is an unoccupied place; has no irrigable lands; has land dependent on the seasons; has been recognized as the property of the mission of Santa Cruz; and for the purposes it may serve, I sign this with the second regidor, on account of the absence ——, in the town hall of the town of Branciforte, on the 2d December, 1833.

(Signed) ANTONIO ROBLES.

(Signed) JOSE MARIA SALASON.

[* 169] *I agree to there being granted the petitioner, Juan Jose Gonzales, the place he asks for, as it is a place which this mission does not at present occupy; nor is it deemed necessary for it, in consideration of the fact that it has land enough for its cattle, and that, being unoccupied, it is considered public land: besides, when the mission occupied it —— had abundance of cattle,

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— have died and diminished, and the few that remain do not need the land. He is a person of merit, and the mission ought to place him before any other person. He has all the requisites, and is entitled to it; and — testimony I sign, on the 7th December, 1833.

Friar ANTONIO SURRA DEL REAL,
Minister of Santa Cruz.

MONTEREY, *December 10, 1833.*

Let it pass to the alcalde of this capital, before whom the party will produce, on information of three fit witnesses, who will be questioned upon the following points:

1. If the petitioner is a Mexican by birth; if he has served in the army; if he is married, and has children; if he is of good conduct.

2. If the land he asks for is of the ownership of any individual, or corporation or pueblo; if it is irrigable, dependent on the seasons, or pasture land, and what is its extension.

3. If he has cattle with which to stock it, or the possibility of acquiring them.

This examination being mane, let him return the expediente for its decision. His excellency the political chief, commanding general, inspector and general of brigade, Don Jose Figueroa, thus ordered, decreed, and signed it, to which I certify.

(Signed) JOSE FIGUEROA.

(Signed) AGUSTIN V. ZAMORANO.

Let the party interested in this expediente be notified to present the witnesses who are to be examined on the points included in the superior decree of the 10th instant which precedes this.

Thus I, the alcalde, decreed, ordered, and signed it, [170] with the assisting witnesses, in the established form.

MARCELINO ESCOBAR.

Assisting witnesses:

(Signed) JOSE MARIA MALDORADO.

(Signed) JOSE ANTONIO ROMERO.

On the same day, present Juan Jose Gonzales, the foregoing act was made known to him, and having understood it, he said that he heard it, and that he presents citizens Salvio Pacheco, Manuel Larios, and Felipe Hernandez, and he signed it with me and the assisting witnesses.

(Signed) N. ESCOBAR.

(Signed) JUAN GONZALES.

Assisting witnesses:

(Signed) JOSE MARIA MALDORADO.

(Signed) JOSE ANTONIO ROMERO.

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In the port of Monterey, on the 13th day of the month of December, one thousand eight hundred and thirty-three, present Salvio Pacheco, witness presented on the part of the persons interested, oath was received in form of law.

The petitioner is a Mexican by birth; was in the army; has thirteen children. The land petitioned for has no private ownership; understood it belongs to the mission of Santa Cruz; that its extent is from a league to a league and a half from east and from north to south; he does not know how much of it is, as it is a canon which reaches to the rancho of citizen Antonio Buelna. He has two hundred head of cattle, a drove of mares and tame horses, &c.

Manuel Larios, a witness, says he is a Mexican; was in the army; is married; has children; knows that the land petitioned for pertains to the mission of Santa Cruz; that the said place is dependent on the seasons; that the land is about a league or more wide, and two from the beach to the hills.

A witness, Felipe Hernandez, repeats the same facts as stated by the prior witness.

MONTEREY, *December 3, 1833.*

The official acts ordered in the foregoing superior being [* 171] finished, *let the expediente be returned to the superior political chief for the superior decision. N. ESCOBAR.

MONTEREY, *December 17, 1833.*

Having seen the petition with this expediente, commences the report of the municipal authority of the town of Branciforte, that of the Rev. father minister of Santa Cruz, the declarations of the witnesses, together with all other things which were presented and deemed proper to be seen, in conformity with the provisions of the laws and regulations on the matter, Juan Jose Gonzales is declared owner in fee of the land known by the name of San Antonio, (or El Pescadero,) bounded by the rancho of Antonio Buelna, the sierra, the coast, the Arroyo del Butano, subject to the conditions which may be stipulated. Let the corresponding patent issue, let note be made in the proper book, and let this expediente be directed for the approbation of the most excellent territorial, in which case the person interested, who will be made to know this decree, will again present his title, that it may be revalidated.

JOSE FIGUEROA.

The committee on colonization and vacant lands, to whom was referred the expediente, the formation of which was caused by the

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petition of citizen Juan Jose Gonzales for the place named San Antonio, or El Pescadero, having examined it with the corresponding circumspection, taking into consideration at the same time the law of August 18th, 1824, those agreeing with it, and the general directions which, on the 24th November, 1828, the supreme government of the union gave for the better fulfillment of the first; from the examination of the expediente, the committee has become impressed with the opinion which it before held of the scrupulousness and tact with which his excellency the political chief ordered it to be made, so that neither in its formation, nor in the steps taken, in any essential requisite wanting; wherefore the committee concludes by offering to the deliberation of this most excellent deputation the following proposition :

1. Approved the grant made to citizen Juan Jose Gonzales of the place named San Antonio El Pescadero, on the 24th *December, 1833, in entire conformity with the provisions [* 172] of the law of August 18th, 1824, and article 5th of the regulation of November, 1828.

MONTEREY, *May* 10th, 1834.

(Signed)

CARLOS ANTONIO CARRILLO.

(Signed)

JOSE CASTRO.

(Signed)

JOSE T. ORTEGA.

(Signed)

JOSE A. ESTUDILLO.

MONTEREY, *May* 17, 1834.

In sessions of this day, the proposition of the foregoing report was approved by the most excellent deputation ordering that the expediente be returned to his excellency the superior political chief, for the convenient purposes. (Signed) JOSE FIGUEROA.

JUAN B. ALVARADO, *Secretary*.

GEORGE FISHER, *Secretary*.

Opinion of the Board by Com'r R. Aug. Thompson.

For the place called San Antonio, or El Pescadero.—Claim of for one square league of land in the county of Santa Cruz.

This claim is founded on a grant made by Governor Figueroa, on 24th December, 1833, to the present claimant, which was duly approved by the territorial deputation on the 17th day of May following. The grant describes the land as that known by the name of San Antonio, or El Pescadero, bounded by the rancho of Antonio Buelna, the sierra, the coast, and the Arroyo del Butano. The fourth condition states that the land of which donation is made is one league in length and three-quarters of a league in breadth, a little more or less, as shown by the map which goes with the

expediente, with the usual reservations of the sobrante or overplus to the use of the nation. The boundaries are distinctly marked out on the map; and although there is no scale on the map, by which the extent of the boundaries can be ascertained, yet there is a note made upon it, stating that they extend one league from north to south, and three-quarters of a league from east to west. This description, taken in connection with that contained in the grant, shows very clearly that it is a grant by metes and bounds, and that consequently no sobrante can result.

[* 173] * The original grant is in evidence, and the genuineness of the signatures of the governor and secretary appearing thereon are duly proved by the deposition of David Spence. Manuel Jimeno proves that the claimant has occupied the land since 1833; that he had a house, horses, and sowings on it, and he still lives on it.

Entertaining no doubt, from the facts of the case, that the grant is a valid one to the extent of one league in length, and three-quarters of a league in breadth, it is hereby confirmed to that extent; the three-fourths of a league to be surveyed within the out-boundary represented on the disenso.

Mr. Justice CAMPBELL delivered a separate opinion, in which Mr. Justice NELSON concurred.

The plaintiff was confirmed in his claim to a parcel of land designated as San Antonio, or El Pescadero, in the county of Santa Cruz, by the board of commissioners. The description of the land in their decree is as follows:

“ Being the same which has been held and occupied by the present claimant since the year 1833 to the present time, and is bounded as follows: Beginning at the mouth of the Arroyo del Butano, and running along the sea coast, and bordering thereon, to the boundary line of Antonio Buelna, the distance being one league, a little more or less; thence with the line of said Buelna east three-quarters of a league; thence a line southerly parallel with the sea coast until it intersects the Arroyo del Butano, at the distance of three-quarters of a league from the coast; thence along said arroyo and bordering thereon to its mouth, the place of beginning; the same being in extent three-fourths of a square league, a little more or less. For a more particular description, reference being had to the original grant and map contained in the expediente from the archives now in the custody of the United States surveyor general for California, the first of which and a traced copy of the latter are filed in the case.”

The United States, at the relation of Crawford, v. Addison. *

The parties appealed to the district court, and, upon the hearing of the cause, the decree of the commissioners was affirmed, and it was further ordered, that the claim of the * said Juan [* 174] Jose Gonzales is a good and valid claim to the land known by the name of San Antonio, or Pescadero, to the extent and within the boundaries mentioned in the grant and map, the original of the former and copy of the latter being on file in the records of this case. From this decree the plaintiff appealed. The only question presented on the appeal is, whether the grant is to be located according to the natural calls in the grant, or whether the claimant is to be confined to the quantity specified in the 4th condition of the grant. But the decision of this question is reserved in the decree of the district court, and will properly arise after the location. The failure to direct the precise manner of the location is not erroneous. The result therefore is, that the decree must be affirmed.

THE UNITED STATES, at the relation of CRAWFORD, v. HENRY ADDISON.

22 H. 174.

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L-ed 304
130 176

WRIT OF ERROR—AMOUNT IN CONTROVERSY—MANDAMUS.

1. On a writ of error to the circuit court for the District of Columbia, where the judgment is removal from office, the salary being \$1,000 per annum, is sufficient for jurisdiction, though it be paid monthly.
2. The writ of error in such case operates as a *supersedeas*, and prevents the removal of the incumbent defendant until the case is decided in this court.
3. A *mandamus* will not be granted in such case to compel the inferior court to execute its judgment, notwithstanding the fact that the term for which the relator was elected will expire before the case can be heard in this court.

THIS was an application for a writ of *mandamus* to the judges of the circuit court for the District of Columbia to compel them to execute their judgment by removing the defendant Addison from the office of mayor of Georgetown, and inducting the relator Crawford. Addison had in due time sued out his writ of error and filed a bond, which the judges below held to be a *supersedeas*, and they had refused to proceed to execute the judgment on Crawford's request. The case is otherwise fully stated in the opinion.

Mr. Brent and *Mr. Carlisle*, for the relator.

Mr. Bradley and *Mr. H. Winter Davis*, for Addison.

* Mr. Justice McLEAN delivered the opinion of the court. [* 181]

This is a writ of error to the circuit court of the United States for the District of Columbia.

•The United States, at the relation of Crawford, v. Addison.

Richard R. Crawford, of the city of Georgetown, in the District of Columbia, states, that on the fourth Monday of February, 1857, in pursuance of an act of congress to amend the charter of Georgetown, approved the 31st May, 1830, and an act to amend the same charter, approved the 11th August, 1856, by ballot to elect some fit and proper person, having the qualifications required by law, to be mayor of the corporation of Georgetown, to continue in office two years, and until a successor shall be duly elected, said Crawford, being duly qualified, received the greatest number of legal votes, and was elected mayor of the said corporation, and took the oath as mayor and continued to discharge the duties for two years.

On the fourth Monday of February, 1859, another election was held for Mayor, at which he received the greatest number of legal votes, and was by the judges declared to be duly elected; on which he presented himself in the presence of the two boards of the common council of the said corporation, and claimed that the oath should be administered; but the said two boards, alleging that there was a mistake in the returns, and that there was in fact a majority of one vote in favor of Henry Addison, who was the opposing candidate, and to whom the oath of office was administered, and who took possession of the office, and continues to exercise the duties of the same.

And your petitioner represents, that at the ensuing [* 182] term of * the circuit court of the District of Columbia, being the court then and still having jurisdiction in the premises, an information, in nature of *quo warranto*, upon the relation of your petitioner, was filed in the said court by Robert Ould, Esq., the attorney of the United States for the District of Columbia, on which due process was issued against the said Henry Addison, requiring him to answer before the said court by what warrant he claimed to exercise the said office of mayor of the corporation of Georgetown.

And the said Addison having pleaded to the said information, and certain replications having been made to said plea by the said attorney of the United States, certain issues were joined thereon at the October term, 1859, of the said court, and amongst others the issue to try whether the said Henry Addison had, as alleged by him in his plea, received the greatest number of legal votes for mayor at the said last-mentioned election; and upon the issue it was found by the jury, duly impaneled and sworn to try the same, that the said Henry Addison did not receive the greatest number of legal votes for mayor at the said election; and thereupon the said court rendered judgment of ouster against the said

The United States, at the relation of Crawford, v. Addison.

defendant, and for the costs of your petitioner, as relator in the said proceeding, to wit, on the —— day of December instant.

Whereupon due process for the execution of the said judgment, to remove the said defendant and for the recovery of the costs aforesaid, was duly prayed of the said court; but the said Henry Addison, pretending that the proceedings upon the said information in matter of law may be reviewed by this honorable court upon writ of error, sued out such writ of error, filed a bond, and caused a citation to be issued and served upon your petitioner, to appear and answer to the said writ of error on the return thereof, to wit, at the December term, 1860. And thereupon the said circuit court, for the express and sole reason that such writ of error and bond operated as a *supersedeas*, (which is expressed in their order in that behalf,) refused to execute the said judgment, or to issue any process to remove the said defendant or for the recovery of the costs aforesaid.

* Your petitioner is advised, and humbly submits, that [* 183] this honorable court hath no jurisdiction of the matter of the said writ of error, and that the same must be dismissed on the return thereof. But, as hereinbefore stated, the said writ is not returnable until December term, 1860, and the term of office for which your petitioner was elected as aforesaid will then be about to expire.

Your petitioner is advised that his only adequate and proper remedy is by a *mandamus* from this honorable court, directed to the judges of the said circuit court of the District of Columbia, commanding them to issue process for the execution of the judgment aforesaid. And for that the transcript of record herewith filed plainly expresses on its face the sole cause for the refusal of such process, so as distinctly to present the whole matter of law for the consideration of the court, he prays that a peremptory *mandamus* may issue, or, in the alternative, that such interlocutory order may be passed to that end, as this court may direct.

Under the thirteenth section of the judiciary act of 1789, the supreme court has "power to issue writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed or persons holding office under the United States." The power of the circuit courts to issue the writ of *mandamus* is confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction. *Kendall v. United States, Curtis*, 12th vol. 851.

On a *mandamus*, a superior court will never direct in what manner the discretion of an inferior tribunal shall be exercised; but they will, in a proper case, require the inferior court to decide.

The United States, at the relation of Crawford, v. Addison.

Life Insurance Company v. Wilson's Heirs, 8 Peters, 294. It has repeatedly been declared by this court that it will not by *mandamus* direct a judge as to the exercise of his discretion; but it will require him to act. 13 Pet. 279.

A *mandamus* is a remedy where there is no other appropriate relief, and it is only resorted to on extraordinary occasions.

The writ of error is a common-law writ, and is almost as old as the common law itself. This writ, to operate as a [* 184] **supersedeas*, must be issued within ten days after the rendition of the judgment, and on security being given for a sum exceeding the amount of the judgment. Where no *supersedeas* is required, security for the costs of the supreme court must be entered. So that, in these respects, the writ of error is said to be a writ of right, though regulated by statute.

The condition on the *supersedeas* bond is: "that the said Henry Addison shall prosecute the said writ of error to effect, and answer all damages and costs if he shall fail to make his plea good; then the above obligation to be void; otherwise to be and remain in full force and virtue."

In the Columbus Insurance Company v. Wheelright and others, 7 Wheat. 534, it was held that a writ of error will lie from this court upon the judgments of the circuit courts awarding a peremptory *mandamus*, if the matter in controversy is of sufficient value. But in that case, it did appear that the office of director of the insurance company, which was the matter in controversy, was of less value than one thousand dollars, and that its value was to be ascertained by the salary paid; the court held it had no jurisdiction.

The weight of this authority is not lessened by the fact on which the question of jurisdiction turned. The salary of the mayor of Georgetown was established by law at one thousand dollars per annum; and if this be the matter of controversy, it settles the jurisdiction.

But it is contended that a year's salary cannot be regarded as the amount in controversy, as the salary is paid monthly or quarterly, as may be most convenient to the mayor. The law regulates the pay of all salaried officers by the year, and the estimates are so appropriated in the reported bills. Any departure from this annual allowance would derange, more or less, the fiscal action of a government or corporation.

But it is said that the remedy by writ of error is inappropriate and ineffectual, as the office of the relator will expire about the time the writ of error is made returnable. This may be a defect in

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the law, which the legislative power only can remove. A writ of error returnable *instanter* would give *more speedy [* 185] relief, and might be more satisfactory, but we must administer the law as we find it.

The bond and security given on the writ of error cannot be regarded as an idle ceremony. It was designed as an indemnity to the defendant in error, should the plaintiff fail to prosecute with effect his writ of error.

We can entertain no doubt that the writ of error is the legal mode of revising the judgment of the circuit court in this case; and that security having been given on the judgment, as the law requires, it is superseded.

Mr. Justice WAYNE and Mr. Justice GRIER dissented.

DAVID MAXWELL and others, Plaintiffs in Error, v. ISRAEL M. MOORE and others.

22 H. 185.

JURISDICTION OVER STATE COURTS—ACTS OF CONGRESS CONSTRUED.

Where the act of congress of 1812, giving bounty lands to regular soldiers, made all sales void before the patent issued, and another act of 1826 permitted the soldier to relinquish the land already patented and make a new location: Held, that the restriction on sale of the right to relocate did not exist, as nothing was said to that purport in the act of 1826.

THIS is a writ of error to the supreme court of Arkansas. The case is fully stated in the opinion.

Mr. Fowler, for plaintiffs in error.

Mr. Watkins, for defendants.

* Mr. Justice CATRON delivered the opinion of the court. [* 190]

This cause is brought before us by writ of error to the supreme court of Arkansas, and presents a single question for our consideration.

Allen McVey served as a regular soldier in the war of 1812, and was entitled to a tract of 160 acres of land as a bounty for his services. The land was located and granted in what is now the State of Arkansas. By the act of May 6, 1812, which granted the bounty lands, all sales or agreements made by a grantee of these lands before the patent issued were declared to be void.

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Many tracts of the lands granted turned out to be unfit for cultivation, so that the soldier took no benefit; and, as compensation, the act of May 22, 1826, declares that the soldier, or his heirs, to whom bounty land has been patented in the territory of Arkansas, and which is unfit for cultivation, and who has removed or shall remove to Arkansas with a view to actual settlement on the land, may relinquish it to the United States, and enter a like quantity elsewhere in the district, which may be patented to him. This act was continued in force by that of May 27th, 1840.

McVey surrendered his first patent according to the act of 1826, and in 1842 another issued in his name for the land in dispute.

In 1834, McVey gave William Pelham a bond to convey to him the land that might be entered on his certificate of surrender, (known as a float,) and a power of attorney to locate the same, and obtain the patent. McVey died in 1836. In 1842, Pelham entered the land in controversy in McVey's name.

[* 191] * A special act of the legislature of the State of Arkansas was passed, authorizing McVey's administrator to convey the land to Pelham, which was done.

Afterwards, the plaintiffs in error obtained a conveyance from the heirs of McVey, on which their action of ejectment is founded. As the title vested in Allen McVey's heirs by the patent of 1842, they could well convey the land unless the administrator's deed stood in the way. *Galloway v. Findley*, 13 Peters, 264. That the special act of assembly authorized the administrator to make a valid deed, and divest the title of the heirs, was decided in this case by the supreme court of Arkansas, and which decision on the effect of the State law is conclusive on this court. We exercise jurisdiction to revise errors committed by State courts, where the plaintiff in error claims title by force of an act of congress, and the title has been rejected on the ground that the act did not support it. And this raises the question, whether the act of 1826, allowing the soldier to exchange his land, carried with it the prohibition against alienation contained in the act of 1812.

The court below held that it did not, and that Allen McVey did lawfully bind himself to Pelham for title.

It is insisted that the acts of 1812 and 1826 are on the same subject, must stand together as one provision, and the last act carry with it the prohibition found in the first. We are of the opinion that the acts have no necessary connection; that there was no good reason why the soldier who removed to Arkansas, and inspected his tract of land, then patented, and alienable, should not contract to convey the tract he might get in exchange. We can only here

 Verden v. Coleman.

say, as we did in the case of *French v. Spencer*, (21 How. 238,) that the act of 1826 is plain on its face and single in its purpose; and that in such cases the rule is, that where the legislature makes a plain provision, without making any exception, the courts of justice can make none, as it would be legislating to do so.

There being no other question presented by the record within the jurisdiction conferred on this court by the 25th section of the judiciary act, we order that judgment of the supreme court of Arkansas be affirmed.

SAMUEL VERDEN, Appellant, v. ISAAC COLEMAN.

22 H. 192.

JURISDICTION OVER STATE COURTS.

An appeal from a decree of a State court dismissed, because no case can be brought here from a State court in any other mode than by writ of error.

APPEAL from the supreme court of Indiana. No writ of error was sued out or filed. The opinion states the facts.

Mr. Justice CATRON delivered the opinion of the court.

Coleman sued Verden in a State court of Indiana, on a note of hand, and a mortgage of lands, to secure its payment. On various pleadings and proofs, the cause was submitted for judgment to the court, the parties having dispensed with a jury. Judgment was rendered against Verden, who appealed to the supreme court of Indiana. There the judgment of the circuit was affirmed.

This occurred on the 26th day of June, 1858. And then we find the following entry of record: "And afterwards, to wit, at a court began and held on the 24th of May, 1858, and continued from day to day till July 16th, 1858, at which time comes the appellant, by Hon. D. Mace, his attorney, and prays an appeal to the United States supreme court, which prayer is granted."

* Bond was given to prosecute the appeal, and the clerk [* 193] certifies the record to be a true copy of the proceedings.

No *appeal* can be taken from the final decision of a State court of last resort, under the twenty-fifth section of the judiciary act, to the supreme court of the United States. A writ of error alone can bring up the cause. We refer to the appendix of Curtis's Digest for the mode.

It is ordered that the case be dismissed.

Lytle v. The State of Arkansas.

ROBINSON LYTLE and others, Plaintiffs in Error, v. THE STATE OF ARKANSAS and others.

22 H. 193.

JURISDICTION OVER STATE COURTS—EQUITY SUPERIOR TO PATENT.

1. The judgment of the State courts protecting parties as innocent purchasers, and by reason of the statute of limitations, is not subject to revision in this court.
2. But the question of fraudulent and false swearing in obtaining a certificate of pre-emption and a patent from the land office is one of which this court can take cognizance.
3. An examination of the testimony in this case shows that the supreme court of Arkansas was right in holding that there was such fraud, and its judgment is therefore affirmed.

THIS is a writ of error to the supreme court of Arkansas. It has been in this court before, and has been reported in 9 How. 314. As it appears now, the matter is fully stated in the opinion.

Mr. Bradley and Mr. Stilwell, for plaintiffs in error.

Mr. Watkins, Mr. Pike, and Mr. Hempstead, for defendants.

[* 202] * Mr. Justice CATRON delivered the opinion of the court.

The first question presented on the record is, whether this court has jurisdiction to examine and revise the decision of the supreme court of Arkansas by writ of error, under the 25th section of the judiciary act? The question arises on the following facts:

Nathan Cloyes, ancestor of the principal complainants, entered as an occupant, at a land office in Arkansas, a fractional quarter section of land, in 1834, under the pre-emption acts of 1830 and 1832. The fraction adjoined the village of Little Rock on its eastern side, and was for twenty-nine acres. The same land had been patented in 1833 by the United States to John Pope, governor of the territory of Arkansas, to be appropriated to the erection of public buildings for said territory. The heirs of Cloyes claimed to have an earlier equity, by force of their pre-emption right, than that of the governor of Arkansas.

They filed their bill in equity in the proper State court, to enforce this equity. That bill contained appropriate allegations to exhibit an equitable title in the plaintiffs, and the opposing right of the patentee, and thus to enable the courts to compare them. Some of the defendants demurred to the bill; others answered, denying the facts of the settlement and cultivation, and pleading the *bona fides* of their purchase and the statute of limitations.

The courts of Arkansas dismissed the bill on the demurrer; which

Lytle v. The State of Arkansas.

judgment was reversed in this court, and the cause remanded for further proceedings. *Lytle v. Arkansas*, 9 How. 314. It was prepared for hearing a second time, and the courts of Arkansas have again dismissed the bill, and the cause is a second time before us.

The cause was fully heard on its merits below; and the claim of Cloyes rejected, on the ground that he obtained his entry by fraud in fact and fraud in law; and the question is, can we take jurisdiction, and reform this general decree? It **rejected* [* 203] *the title* of Cloyes; and in our opinion, it is not material whether the invalidity of the title was decreed in the supreme court of Arkansas upon a question of fact or of law. The fact that the title was rejected in that court authorizes this court to re-examine the decree. 14 Peters, 360.

The decision in the supreme court of Arkansas drew in question an authority exercised under the United States, to wit: that of admitting Cloyes to make his entry; and the decision was against its validity, and overthrew his title, and is therefore subject to be re-examined, and reversed or affirmed in this court, on all the pleadings and proofs which immediately respect the question of the proper exercise of authority by the officers administering the sale of the public lands on the part of the United States.

In the case of *Martin against Hunter's Lessee*, (1 Whea. 352,) the foregoing construction of the 25th section of the judiciary act of 1789 was recognized, and has been followed since, in the cases of *Choteau against Eckhart*, (2 How. 372,) *Cunningham against Ashley*, (14 How. 377,) *Garland against Wynn*, (20 How. 6.) and other cases.

Another preliminary question is presented on this record, namely: whether the *adjudication* of the register and receiver, which authorized Cloyes's heirs to enter the land, is subject to revision in the courts of justice, on proof, showing that the entry was obtained by fraud and the imposition of false testimony on those officers, as to settlement and cultivation. We deem this question too well settled in the affirmative for discussion. It was so treated in the case of *Cunningham against Ashley*, (14 How. 377;) again, in *Bernard against Ashley*, (18 How. 43;) and conclusively, in the case of *Garland against Wynn*, (20 How. 8.)

The next question is, how far we can re-examine the proceedings in the State courts.

In their answers, the respondents rely on the act of limitations of the State of Arkansas for protection. As this is a defense having no connection with the title of Cloyes, this court cannot

revise the decree below in this respect, under the 25th section of the judiciary act.

[* 204] * Many of the defendants also relied in their answers on the fact that they were *bona fide* purchasers of the lots of land they are sued for, and therefore no decree can be made here to oust them of their possessions. The State courts found that a number of the respondents were purchasers without notice of Cloyes's claim, and entitled to protection as *bona fide* purchasers, according to the rules acted on by courts of equity. With this portion of the decree we have no power to interfere, as the defense set up is within the restriction found in the concluding part of the 25th section, which declares "that no other error shall be assigned or regarded by this court as a ground of reversal, than such as immediately respects the before-mentioned questions of validity or construction of the constitution, treaties, statutes, commissions, or authorities, in dispute." Mr. Justice Story comments on the foregoing restraining clause, in the case of *Martin v. Hunter's Lessee*, (1 Whea. 358,) which construction we need not repeat.

Whether Cloyes imposed on the register and receiver by false affidavits, when he made proof of cultivation in 1829, and residence on the land in dispute on the 29th of May, 1830, is the remaining question to be examined. He made oath (23d April, 1831) that he did live on said tract of land in the year 1829, and had done so since the year 1826. Being interrogated by the register, he stated: I had a vegetable garden, perhaps to the extent of an acre, and raised vegetables of different kinds, and corn for roasting-ears; and I lived in a comfortable dwelling, east of the Quapaw line on the before-mentioned fraction. Being asked, Did you continue to reside, and cultivate your garden aforesaid, on the before-named fraction, until the 29th of May, 1830? he answers: "I did; and have continued to do so until this time."

John Saylor deposed on behalf of Cloyes in effect to the same facts, but in general terms. Nathan W. Maynor and Elliott Bursay swore that the affidavit of Saylor was true. On the truth or falsehood of these depositions the cause depends.

In opposition to these affidavits, it is proved, beyond dispute, that Cloyes and his family resided at a house, for a part of the [* 205] * year 1828, occupied afterwards by Doctor Liser. In the latter part of 1828, they removed from that place to some log cabins, situate on the lots afterwards occupied by John Hutt, and where the governor of Arkansas resided in 1851, when the witnesses deposed. Both places were west of the Quapaw line—the cabins standing probably one hundred yards west of the line,

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and which line was the western boundary of the fractional quarter section in dispute. Cloyes resided at these cabins when he swore at Batesville, before the register; and continued to reside there till the time of his death, which occurred shortly after his return from Batesville, say in May or June, 1831, and his widow and children continued to reside at the same cabins for several years after his death.

Cloyes was by trade a tinner, and in December, 1826, rented of William Russell a small house, constructed of slabs set upright, in which he carried on his business of a tin-plate worker. He covenanted to keep and retain possession for Russell of this shop against all persons, and not to leave the house unoccupied, and to pay Russell two dollars per month rent, and surrender the house to Russell or his authorized agent at any time required by the lessor.

Under this lease, Cloyes occupied the house until the 19th day of June, 1828, when he took a lease from Chester Ashley for the same, and also for a garden. He covenanted to pay Ashley one dollar per month rent; to put and keep the building in repair; to keep and retain possession of the same, until delivered back to said Ashley by mutual consent, either party having a right to terminate the lease on one month's notice. The house and garden were rented by the month.

Under this lease, Cloyes occupied the house, as a tin-shop, to the time of his death. Both the leases state that the shop was east of the Quapaw line, and on the public lands.

This slab tenement was built by Moses Austin, about 1820. On leaving Little Rock, he sold it to Doctor Matthew Cunningham; it passed through several hands, till it was finally owned by Col. Ashley. Buildings and cultivated portions of the public lands were protected by the local laws of the Arkansas territory; either ejectment or trespass could have *been maintained [* 206] by Ashley against Cloyes to recover the premises, nor could an objection be raised by any one, except the United States, to these transfers of possession—neither could Cloyes be heard to disavow his landlord's title. He held possession for Ashley, and was subject to be turned out on a month's notice to quit.

Cunningham and other witnesses depose that the shop rented to Cloyes stood west of the Quapaw line. It however appears, from actual survey, that it was on the section line, which ran through the house, taking its southeast corner on the east side, but leaving the greater part of the shop west of the line.

Another pertinent circumstance is, that when Cloyes heard the

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pre-emption law of 1830 was about to pass, or had passed, (it is uncertain which, from the evidence,) he removed his wife and children, with some articles of necessary furniture, to the tinner's shop, from his residence at the Hutt place, and kept his family at the shop for a few months, and then they returned to their established home. This contrivance was probably resorted to at the instance of Benjamin Desha, who had agreed with Cloyes to pay into the land office the purchase money, and all incidental expenses, to obtain a title from the government for an interest of one-half of the land. These evasions were mere attempts to defraud the law, and to furnish some foundation for the necessary affidavits to support his pre-emption claim at the land office.

On this aspect of the case, the question arises, whether Cloyes's possession as lessee and tenant of Ashley, occupying a shop as a mechanic, the corner of which accidentally obtruded over the section line, upon the public land, and who was subject to removal by his landlord each month, was "a settlement" on the public lands, within the true intent and meaning of the act of May, 1830?

That Cloyes never contemplated seeking a home on the public lands as a cultivator of the soil, is manifest from the proof; he worked at his trade, when he worked at all, (say the witnesses,) and followed no other avocation. Our opinion is, that the [* 207] affidavits, on which the occupant entry was founded, * were untrue in fact, and a fraud on the register and receiver; and that Cloyes had no *bona fide* possession as tenant of the tinner's shop, within the true meaning of the act of 1830.

We are also of opinion, that the affidavits are disproved, as respects the fact of cultivation in 1829. There was no garden cultivated in that year, adjoining or near to the shop. To say the least, it is quite doubtful whether there was such cultivation east of the Quapaw line; and the State courts, having found that there was none, it is our duty to abide by their finding, unless we could ascertain, from the proof, that they were mistaken, which we cannot do; our impressions being to the contrary.

The question of cultivation in May, 1830, depended on parol evidence of witnesses. The judges below knew them; they decided on the spot, with all the localities before them; and as the evidence is contradictory, it would be contrary to precedent for this court to overrule the finding of a mere fact by the courts below.

On the several grounds stated, we order that the decree of the supreme court of Arkansas be affirmed, with costs.

Mr. Justice McLEAN and Mr. Justice CLIFFORD dissented.

Mr. Justice McLEAN :

I dissent from the opinion of the court, as now expressed, and shall refer to the former opinion, to show the nature of the case :

"After the refusal of the receiver to receive payment for the land claimed, an act was passed, 14th July, 1832, continuing the act of the 29th May, 1830, and which specially provided that those who had not been enabled to enter the land, the pre-emption right of which they claimed, within the time limited, in consequence of the public surveys not having been made and returned, should have the right to enter such lands, on the same conditions in every respect as prescribed in said act, within one year after the surveys shall be made and returned. * And this act was [* 208] in full force before Governor Pope selected said lands.

That the public surveys of the above fractional sections were made and perfected on or about the 1st of December, 1833, and returned to the land office the beginning of the year 1834. On the 5th of March, 1834, the complainant paid into the land office the sum of \$135.76 $\frac{1}{4}$, in full for the above-named quarter section."

That a certificate was granted for the same, "on which the receiver endorsed, that the northwest fractional quarter section two was a part of the location made by Governor Pope in selecting 1,000 acres, adjoining the town of Little Rock, granted by congress to raise a fund for building a court-house and jail for the territory ; and that the endorsement was made by direction of the commissioner of the general land office." "That the register of the land office would not permit the said fractional quarter sections to be entered."

It appeared that "the patentees in both of said patents, at the time of their application to enter the lands, had both constructive and actual notice of the right of Cloyes, and that the present owners of any part of these lands had also notice of the right of the complainants."

In his dissenting opinion, Judge Catron says: "The proof of occupancy and cultivation was made in April, 1831, under the act of 1830, pursuant to an instruction from the commissioner of the general land office having reference to that act. The act itself, the instruction under its authority, and the proofs taken according to the instruction, expired and came to an end on the 29th May, 1831. After that time, the matter stood as if neither had ever existed ; nor had Cloyes more claim to enter from May, 29, 1831, to July, 1832, than any other villager in Little Rock."

Now, although it may be true that, until the act of 1832, had passed, the act of 1830 having expired, the pre-emptive right of

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Cloyes could not be perfected, yet the policy of the law was, where vested rights had accrued, which, by reason of delays in the completion of surveys, could not be carried out, the government gave relief

by extending the law. And the inchoate right was secured [* 209] by the policy of the government. It is therefore not strict-

ly accurate to say, the party entering a pre-emption has no right. He has a right, recognized by the government, by which he is enabled to perfect his right; and, under such circumstances, no new entry could interfere with a prior one, though imperfect.

This court say, the proof of the pre-emption right of Cloyes being entirely satisfactory to the land officers, under the act of 1830, there was no necessity of opening and receiving additional proof under any of the subsequent laws. The act of 1830 having expired, all rights under it were saved by the subsequent acts. No steps which had been taken were required again to be taken.

Did the location of Governor Pope, under the act of congress, affect the claim of Cloyes? On the 15th of June, 1832, one thousand acres of land were granted, adjoining the town of Little Rock, to the territory of Arkansas, to be located by the governor. This selection was not made until the 30th of January, 1833. Before the grant was made by congress of this tract, the right of Cloyes to a pre-emption had not only accrued, under the provisions of the act of 1830, but he had proved his right, under the law, to the satisfaction of the register and receiver of the land office. He had, in fact, done everything he could do to perfect this right. No fault or negligence can be charged to him.

"By the grant to Arkansas, congress could not have intended to impair vested rights. The grants of the thousand acres and of the other tracts must be so construed as not to interfere with the pre-emption of Cloyes."

From the citations above made in the original opinion in this case, the following facts and principles of law are too clear to admit of doubt by any one:

1. That Cloyes's pre-emption to fractional quarter section No. 2 was clearly established, by the judgment of the land officers and of this court.

2. That the location of Governor Pope, being subsequent to the right of Cloyes, could not affect, under the circumstances, that right, and that the conveyance was subject to it. This appears by the certificate of the land office, by the uniform [* 210] action of the government in all such cases, and the good faith which has characterized the action of government, in protecting pre-emption rights, by giving time to protect such

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right, where the government officers had failed in doing their duty. And in addition to these considerations, in the solemn declaration of this court, "that congress could not have intended to impair vested rights." And the court say, "the grants of the thousand acres and of the other tracts must be so construed as not to interfere with the pre-emption of Cloyes."

This court say, "The supreme court of the State, in sustaining the demurrers and dismissing the bill, decided against the pre-emption right claimed by the representatives of Cloyes; and as we consider *that* a valid right as to the fractional quarter on which his improvement was made, the judgment of the State court was reversed."

"Now, the defendants demurred to the original bill, which they had a right to do, and rest the case on the demurrer's appearing on the face of the bill. But this court held Cloyes's right valid, and consequently reversed, on this head, the judgment of the State court. And the cause is transmitted to the State court for further proceeding before it, or as it shall direct on the defense set up in the answers of the defendants, *that they are bona fide purchasers of the whole or parts of the fractional section in controversy, without notice*, and that that court give leave to amend the pleadings on both sides, if requested, that the merits may be fully presented and proved, as equity shall require."

Now, it is perfectly clear that nothing was transmitted under the direction of this court to the State court, except the latter part of the sentence beginning, "*and the cause is transmitted to that court,*" &c. And that part relates wholly to the inquiry whether the defendants were *bona fide* purchasers of the whole or parts of the fractional section in controversy. And for this purpose, leave was given to amend the pleadings.

If there is anything in this bill which afforded any pretense to the State court to open the pleadings, and examine any matters in the bill, except those specified in its close, it has escaped my notice.

* It is said in the bill, "the register and receiver were [* 211] constituted, by the act, a tribunal to determine the right of those who claimed pre-emptions under it. From their decision no appeal was given. If, therefore, they acted within their powers, as sanctioned by the commissioner, and within the law, the decision cannot be impeached on the ground of fraud or unfairness; it must be considered final."

The court here was speaking of its own powers of jurisdiction and investigation, and not the powers of any other tribunal. It

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was supposed that no superior court would willingly permit its judicial powers to be subverted, new parties made, new subjects introduced, and the whole proceedings reversed, at the will of an inferior jurisdiction, without the exercise of a controlling power.

This State record of Arkansas seems to have been a prolific source of controversy, as its proportions have grown to about a thousand pages, not including briefs and statements of facts. It certainly must require some skill in legislation, to draw into the State court so large an amount of business under the laws of congress. And it may become a matter of public concern, when such a mass of judicial action is not only thrown into the State court, but new rules and principles of action are liable to be sanctioned, in disregard of the laws of the United States.

Without any authority, it does appear that the judgment of the supreme court has been reversed by the Arkansas court, its proceedings modified in disregard of its own judgments and opinions clearly expressed, and new rules of proceedings instituted and carried out; and this under an authority given to the Arkansas court to ascertain whether certain purchases had been made *bona fide*.

Cloyes, in his lifetime, by his own affidavit, and the affidavits of others, made proof of his settlement on, and improvement of, the above fractional quarter, according to the provisions of the act, to the satisfaction of the register and receiver of said land district, agreeably to the rules prescribed by the commissioner of the general land office; on the 20th May, 1831, Hartwell Boswell, [* 212] the register, and John Redman, the *receiver, decided that the said Cloyes was entitled to the pre-emption right claimed. "On the same day, he applied to the register to enter the northwest fractional quarter of section two, containing thirty acres and eighty-eight hundredths of an acre." But the register very properly decided that Cloyes could only be permitted to enter the fraction on which his improvement was made.

The commissioner of the general land office, and the register and receiver, declare they were satisfied with the proof made in the case; but the supreme court of Arkansas decided against the pre-emption right claimed by the representatives of Cloyes; and the supreme court of the United States say, "as we consider *that* a valid right as to the fractional quarter on which the improvement was made, the judgment of the State court is reversed."

How does this case now stand? It stands reversed upon our own records by the supreme court of Arkansas, and by no other power. A majority of this bench entered the judgment, as it now stands, in 1849. But, through the reforming process, of a record of a

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thousand pages, not including notes and statements of facts, it has become a formidable pile, enough to fill with despair the first claimant of the pre-emption right.

It is true, the cause was sent down for a special purpose, every word of which I now copy:

“And the cause is transmitted to that court (the supreme court of Arkansas) for further proceedings before it, or as it shall direct, on the defense set up in the answers of the defendants, that they are *bona fide* purchasers of the whole or parts of the fractional sections in controversy, *without notice*, and that that court give leave to amend the pleadings on both sides, if requested, *that the merits of the case* may be fully presented and proved, as equity shall require.”

Several of the defendants alleged they were *bona fide* purchasers of a part or the whole of the fraction, without notice; and the object in sending the case down was to enable persons to show they were purchasers of this character. This did not necessarily involve fraud. And this embraces the whole subject of inquiry.

* It would have been inconsistent for this court to say, [* 213] we consider the pre-emption claim by the representatives of Cloyes as a valid right, as to the fractional quarter on which his improvement was made, and on that ground to reverse the judgment of the State court, and at the same time send the case down, open to the charge of fraud and every conceivable enormity. The object was to know who were purchasers without notice. That this was the intention of the supreme court, is palpable from the language of the entry.

The majority of the supreme court had full confidence in the validity of Cloyes's claim, and consequently they reversed the judgment of the State court, leaving the question open, whether the defendants were purchasers without notice. It may be that this entry would have protected all the purchasers.

From the nature of pre-emption rights, it is presumed, a person desirous of such a right is the first applicant. And the proof of such a right, if sustained by the register and receiver and the commissioner of the land office, the proof required, is deemed satisfactory. It is only where a fortunate selection appears to be made, by the prospect of a city, or some great local advantage is anticipated, that a contest arises as to such a claim.

The officers of the land department, whose peculiar duty it was to protect the public rights, seemed to have discharged their duty to the satisfaction of the government. This was also entirely satisfactory to a majority of the judges of this court, with the sir

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exception, that, from the answers, it was probable that there may have been purchasers of this right without notice. And from the evidence introduced, it would seem to have been considered that any one who at any time desired to purchase, considered himself as having a right to complain, although he had no means to make the purchase, or had no desire to make it.

If I mistake not, evidence was heard from witnesses from twenty to twenty-five years after the pre-emption right was sanctioned by the government. Such a course tends greatly to embarrass land titles under the general land law. Every one knows that [* 214] a man who endeavors to obtain a pre-emption, * must, in the nature of things, be a man of limited means, and incapable of maintaining an expensive suit at law; and it has always appeared to me the true policy to limit those questions to the land department of the government. At all events, that they should be limited to the federal tribunals, where, it may be presumed, the land department will have an uniform administration.

As this case now stands, I think the judgment of the Arkansas supreme court must be reversed on two grounds:

1. Because it has reversed the judgment of this court, entered by a majority of the members at December term, 1849, in these words: "The supreme court of the State, in sustaining the demurrers and dismissing the bill, decided against the pre-emption claimed by the representatives of Cloyes; and as we consider *that* a valid right, as to the fractional quarter on which his improvement was made, the judgment of the State court is reversed."

This is the judgment of this court as is now stands upon our docket. And

2. The judgment of the State court must be reversed, because it wholly disregarded the directions of this court in trying the issues transmitted to it.

STEAMBOAT KATE.

GEORGE BONDIES and others, Appellants, v. JAMES P. SHERWOOD and others.

22 H. 214.

SALVAGE—CONTRACT—INTERNAL WATERS.

1. Where parties made a contract for raising a vessel within a certain time and for a definite compensation, they cannot repudiate the contract and libel the vessel for salvage.
2. Whether an admiralty suit *in rem* and *in personam* in the same libel can be sustained,

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and whether admiralty has jurisdiction of a salvage case occurring on a river wholly within a State, are open questions in this court not necessary to the decision of this case.

THIS was an appeal from the district court for the eastern district of Texas. The case is sufficiently stated in the opinion.

Mr. Hale and *Mr. Sherwood*, for appellants.

No counsel for appellees.

* Mr. Justice GRIER delivered the opinion of the court. [* 215]

The appellees, describing themselves as ship carpenters, residing in Galveston, filed their libel in the district court of Texas against the steamboat *Kate*, and against Bondies, late master and owner, in a "cause of salvage, civil and maritime."

They charge that the steamboat left the port of Galveston, for ports and places on the Trinity river, in said district of Texas, laden with merchandise. That the boat was snagged and sunk in the river near Morse's bluff, in Liberty county.

That on the 24th of April, 1856, the libelants entered into an article of agreement, under seal, with Bondies, who had become sole owner of both cargo and vessel, to raise the vessel.

In this agreement, the libelants covenant to proceed with * the necessary boats, apparatus, &c., and to raise [* 216] the steamboat at their own cost in fourteen days after their arrival at the place where it lay, provided they were not hindered by high water; when raised, the boat to be taken to Galveston. Bondies covenants to convey the boat to them, on their payment to him of four thousand dollars, and also to subrogate them to all his claims against the cargo. But, in the meantime, until the covenants of libelants were performed, the legal possession of the boat and cargo was to be and remain in Bondies.

The libel alleges that "this agreement was mutually given up and abandoned." But this averment is not sustained by the evidence. On the contrary, it appears that the libelants proceeded under their contract to raise the vessel, but did not succeed till some time in July. The boat and merchandise being much injured in the operation and by the delay, it turned out that the costs and expenses would exceed the whole value of the boat and cargo when recovered. The bargain was therefore an unprofitable one, and the libelants concluded to repudiate it, and filed this libel for salvage.

Without adverting to the numerous other facts developed in the history of this case, but which cannot affect its merits, it is very plain, that assuming the services rendered by these mechan-

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in the nature of salvage services, and that a court of admiralty had jurisdiction to enforce the contract both against the owner and the boat as a maritime contract, yet the libelants, by their own showing, cannot recover under the contract. And it is equally clear that they cannot repudiate their contract, and libel the vessel for salvage.

(See the *Mulgrave*, 2 Hagg. Adm. 269, and *Abbott on Shipping*, 706.)

For this reason alone, the libel must be dismissed.

But there are two other questions which arise on the face of this record, and which it will not be necessary to decide, but which ought not to pass without notice, lest an inference should be drawn from our silence that the court considered them of no importance, or intended to decide them in favor of libelants:

1. By the 19th rule prescribed by this court for practice [* 217] in * the courts of admiralty, it is ordered, that "in all suits for salvage the suit may be *in rem* against the property saved, or *in personam* against the party at whose request and for whose benefit the salvage service has been performed." By reference to Mr. Conkling's treatise, page 42, it will be found that it is the prevailing opinion that both cannot be joined in the same libel. The point has not been brought before this court, and we notice it now only to show that it is not now decided.

2. The libel shows that the steamboat was engaged in the internal trade of the State of Texas, proceeding from a port in the same, up a river wholly within the same. It is not even alleged that she had a coasting license. That a court of admiralty had jurisdiction in such a case, or that the maritime law of wreck and salvage could be applied to it, are questions not made by the pleadings nor noticed in the argument, and therefore are not decided by the court.

Let the libel be dismissed, with costs.

EDWIN M. CHAFFEE, Plaintiff in Error, v. THE BOSTON BELTING COMPANY.

22 H. 217.

PATENT LAW—LICENSEE OF ASSIGNEE.

1. In a suit brought by the assignor of an extended patent for an infringement, a licensee of the patentee has the same rights against the assignee as he would have had against the assignee of the extended patent.
2. But an infringer, who was using the patented article before the extension and assignment, cannot protect himself by showing that another person was licensed to use the article, unless he connects himself in some way with that license, or as purchaser of instrument or thing used from such licensee.

1848 217
L. ed 240
371 204
371 791

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WRIT of error to the circuit court for the district of Massachusetts. The case is very fully stated in the opinion.

Mr. Jenckes and Mr. C. A. Seward, for plaintiff in error.

No counsel for defendant.

* Mr. Justice CLIFFORD delivered the opinion of the court. [* 219]

This case comes before the court on a writ of error to the circuit court of the United States for the district of Massachusetts. It was an action of trespass on the case, for the alleged infringement of certain rights secured by letters patent.

As the foundation of the suit, the declaration alleges, in effect, that the assignor of the plaintiff was the original and first inventor of certain improvements in the manufacture of India rubber, and that in the year 1836 letters patent for such improvements were duly issued to him by the commissioner of patents, as is therein fully and correctly set forth and described.

Those improvements, as is alleged in the declaration, consist in a mode of preparing the rubber for manufacturing purposes, and of reducing it to a pasty state, without the use of the spirits of turpentine or other solvents, and of applying the same to cloths, and for other purposes, by the use of heated rollers and other means, as set forth in the letters patent, saving thereby, as is alleged, a large portion of the expense of reducing the original material to a proper degree of softness, and of fitting and preparing it for the various uses to which it may be applied.

On application subsequently made to the commissioner of patents, in due form of law, by the original inventor, the patent was extended for the further term of seven years, from the thirty-first day of August, 1850; and the plaintiff alleges that the patentee, on the first day of July, 1853, transferred, * as- [* 220] signed, and conveyed to him all his title to the invention and to the patent for the extended term.

By virtue of that deed of transfer, it is claimed in the declaration that the plaintiff acquired the right to demand and recover the damages for all infringements of the letters patent prior to the date of the transfer, as well as for those that have been committed since that time; and, accordingly, the plaintiff alleges that the defendants, on the thirty-first day of August, 1850, fraudulently commenced the use of those improvements, without law or right, and so continued to use them to the day of the commencement of this suit; averring, at the same time, that the defendants have prepared large quantities of the native rubber for manufacturing purposes,

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without the use of spirits of turpentine or other solvents, thereby making large gains, and greatly to the damage of the plaintiff.

As appears by the transcript, the action was entered in the circuit court at the May term, 1854, but was continued from term to term until the May term, 1857, when the parties went to trial upon the general issue.

From what is stated in the bill of exceptions, it appears that one Charles Goodyear was the owner of the original letters patent on the twenty-sixth day of January, 1846, and that he continued to own them for the residue of the term for which they were originally granted. On that day he entered into an indenture with one Henry Edwards, of the city of Boston, whereby, for certain considerations therein expressed, he sold and conveyed to the said Henry Edwards, his executors, administrators, and assigns, the exclusive right and license to make, use, and vend, any and all articles appertaining to machines, or in the manufacture, construction, and use of machines or machinery, of whatever description, subject to certain limitations and qualifications therein expressed.

By the terms of the instrument, it was understood that the right and license so conveyed was to apply to any and all articles substituted for leather, metal, and other substances, in the use or manufacture of machines or machinery, in so far as the grantor had any rights or privileges in the same, by virtue of any invention or improvement made or which should thereafter be made by him in the manufacture of India rubber or gum-elastic goods, and in virtue of any and all letters patent or patent rights of the United States granted or belonging to him, or which should thereafter be granted or belong to him, for any and all inventions or improvements in the manufacture of such goods in this country, but excluding the right to make any contract with the government of the United States. In consideration of the premises, the grantee paid the sum of one thousand dollars, as appears by the recital of the instrument, and agreed to pay a certain tariff, at the rate of five cents per superficial yard, or five cents per pound for the pure gum, according to the nature of the article manufactured.

Reference is made in the declaration to the letters patent, and to the deed of assignment from the patentee to the plaintiff, but neither of those instruments appears in the bill of exceptions or in any other part of the record.

At the trial of the cause, it was conceded and agreed that the defendants, before the date of the plaintiff's writ, used certain machinery, constructed in conformity with the specification annexed to the letters patent declared on, and that the defendants, in using

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the machinery, conformed to the directions contained in the specification, and that the same was so used for the preparation and application of India rubber to the manufacture of the articles mentioned and described in the indenture from Charles Goodyear to Henry Edwards, and that all the machinery so used was constructed and in use as aforesaid before and at the time the original letters patent expired.

Upon this state of the case, according to the bill of exceptions, the presiding justice ruled and instructed the jury, that, under their title, the defendants had the right to continue to use the same machinery for the same purposes, and in conformity with the directions contained in the specification, after the expiration and renewal of the letters patent; and consequently, that the plaintiff could not recover.

Under the ruling and instruction of the court, the jury returned their verdict for the defendants; and the plaintiff excepted to the ruling, and his exceptions were duly allowed.

It is insisted by the counsel of the plaintiff, that the *instruction given to the jury was erroneous; and that is [* 222] the only question presented for decision at the present time. In considering that question, our attention must necessarily be confined to the evidence reported in the bill of exceptions, as the only means of ascertaining the precise state of facts on which the instruction to the jury was given. Whether the report of the evidence, as set forth in the bill of exceptions, may or may not be incomplete, or imperfectly stated, cannot be known in an appellate court. Bills of exception, when properly taken and duly allowed, become a part of the record, and, as such, cannot be contradicted.

By the admission of the parties in this case, it appears that the defendants, before the date of the plaintiff's writ, had used certain machinery, constructed in conformity with the specification of the plaintiff's patent. In the absence of any explanation or suggestion to the contrary, it must be inferred that the use of the machinery so admitted was without the license or consent of the plaintiff, and subsequent to the period when he became the owner of the patent for the extended term; and if so, the admission was sufficient, under the pleadings, to making out a *prima facie* case for the plaintiff. To maintain the issue on their part, the defendants proved in effect, or it was admitted, that all the machinery so used by them had been constructed, and was in use, as aforesaid, before and at the time the original letters patent expired, and that in using the machinery they had conformed to the directions contained in the specification, and that the same was so used for the

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purposes and in the manufacture of the articles specified and described in the before-mentioned indenture. As before stated, they had previously proved, or it had been admitted, that the owner of the original term of the patent had granted the exclusive right and license to a third party to use the invention for the same purposes for which the defendants, both under the original and extended term of the patent, had used their machinery; but they did not prove, and there is no evidence in the case to show, any privity between themselves, and that license, either by assignment or in any other manner. They offered no proof [* 223] tending to show *that their use of the machinery in question, under either term of the patent, was with the license, consent, or knowledge, of the patentee, or of any other person who ever had or claimed to have any power or authority under him to convey the right. Provision is made by the eighteenth section of the act of congress, passed on the fourth day of July, 1836, for the extension of patents beyond the time of their limitation, on application therefor, in writing, by the patentee, to the commissioner of the patent office, setting forth the grounds for such extension. By the latter clause of that section, the benefit of such renewal is expressly extended to assignees and grantees of the right to use the thing patented to the extent of their respective interests therein. 5 Stat. at Large, p. 125. Under that provision, it has been repeatedly held by this court, that a party who had purchased a patented machine, and was using it during the original term for which the patent was granted, might continue to use the machine during the extended term. *Bloomer v. McQuewan et al.* 14 How. 549; *Wilson v. Rosseau*, 4 How. 646. That rule rests upon the doctrine that the purchaser, in using the machine under such circumstances, exercises no rights created by the act of congress, nor does he derive title to it by virtue of the franchise or the exclusive privilege granted to the patentee.

When the patented machine rightfully passes to the hands of the purchaser from the patentee, or from any other person by him authorized to convey it, the machine is no longer within the limits of the monopoly. According to the decision of this court in the cases before mentioned, it then passes outside of the monopoly, and is no longer under the peculiar protection granted to patented rights. By a valid sale and purchase, the patented machine becomes the private individual property of the purchaser, and is no longer protected by the laws of the United States, but by the laws of the State in which it is situated. Hence it is obvious, that if a person legally acquires a title to that which is the subject of letters

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patent, he may continue to use it until it is worn out, or he may repair it or improve upon it, as he pleases, in the same manner as if dealing with property of any other kind. Applying * these principles to the present case, as it is exhibited in [* 224] the bill of exceptions, there would be no difficulty in sustaining the instructions given to the jury, provided it appeared that the machinery used by the defendants had been legally purchased by them of the patentee or his assigns during the original term of the patent. But nothing appears in the evidence reported to warrant the inference that they were either assignees or grantees of the thing patented, within the meaning of the act of congress or the decisions of this court. All that the indenture offered in evidence showed was the nature and extent that the defendants had used the invention, but, as is well contended by the counsel for the plaintiff, it proved nothing more. It did not prove, or tend to prove, that the defendants were rightfully in the enjoyment of the thing patented during the original term of the patent, and having failed to establish any right or license to use their machinery during the extended term by any other proof, they appear in the record as naked infringers.

Their right to continue to use the machinery as against the plaintiff is predicated in the instruction upon the assumption that they had a title to it, and were rightfully in the use of it under that title, before and at the time the original letters patent expired. That assumed fact finds no support in the evidence reported. It is clearly error for the court, in its instruction to the jury, to assume a material fact as proved, of which there is no evidence in the case. *United States v. Breitling*, 20 How. 255. And when the finding of the jury accords with the theory of the instruction, thus assumed without evidence, the error is of a character to deserve correction.

Another position is assumed by the counsel of the plaintiff, which ought not to be passed over without a brief notice. They contend that the invention of the plaintiff, as described in the letters patent, is for a process, and not for a machine or machinery; and that the act of congress, extending the benefit of renewals to assignees and grantees of the right to use the thing patented, when properly construed, does not include patents for a process, but should be confined to patents for machines. That question, if properly presented, * would involve the construction of the letters patent in this case, as well as the act of congress; but as the patent is not in the record, it is not possible to determine it at the present time, and we only advert to it that it may not appear to have escaped attention.

The United States v. Pacheco.

The decree of the circuit court is reversed, with costs, and with directions to issue a new *venire*.

THE UNITED STATES, Appellants, v. ROSA PACHECO and others.

22 H. 225.

CALIFORNIA LAND GRANTS.

A grant with boundaries, but not well defined, the land being two square leagues, a little more or less, with *diseño* and other matters: Held, that claimant is entitled to *two leagues* square, or four square leagues, within the described boundaries.

APPEAL from the district court of the United States for the northern district of California. The case is stated in the opinion.

Mr. Stanton, for the United States.

No counsel for appellees.

Mr. Justice CATRON delivered the opinion of the court.

On the 31st of July, 1834, there was granted to Madame Pacheco a rancho of land, "included between the Arroyo de las Nueces and the Sierra de Golgones, bounded by the said places, and bounded by the ranchos Las Juntas, San Ramon, and Monte Diablo." This description was accompanied by a *diseño*, better defining the exterior boundaries than usual. But the grant has the following condition, amongst others: "The land of which mention is made is two square leagues, a little more or less, as shown by the map which goes with the expediente.

[* 226] * The magistrate who may give the possession will cause it to be measured in conformity with the ordinance, for the purpose of marking out the boundaries, leaving the surplus which may result to the nation, for its convenient uses."

The board of commissioners held that this condition must govern as to quantity, and decreed two square leagues.

In the district court, that decree was reversed, and the land, as above described, and as it is represented on the plan, was decreed to the claimants, regardless of any exact quantity. From this decree the United States appealed. The validity of the grant is not disputed; the contest respects quantity only.

The plan presented by the party, and referred to in the grant, will furnish a guide to the surveyor, as respects boundaries within which the survey shall be made. But, in ascertaining the quantity intended to be given, we think neither the general description,

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nor the call for "two square leagues," found in the condition of the grant, can be relied on, as they are inconsistent, and plainly contradict each other, and the adoption of the one must necessarily reject the other. To find the true quantity intended to be granted, we are compelled to rely on other title papers and proofs.

The map shows, when taken in connection with the evidence of witnesses, explaining its contents, that the body of land petitioned for and granted was something more than two leagues long, and about two leagues wide. To this effect, the parol evidence is conclusive; and the map is equally so on its face, however inaccurate it may possibly be found when the objects called for, and laid down on the map, are sought on the ground. Nothing could be more manifest than that the grant was intended to give to Madame Pacheco a rancho of at least two leagues on each side line, making four leagues in superficies. And as the plan is part of and accompanies the last title paper, we feel bound to give it due weight, in reaching the undoubted equity of the claim.

This court is not dealing with a legal title; none such can exist until there is a survey, the land severed from the public domain, and the public title transferred by a final grant from the United States into private ownership.

* What precise tract of land is to be surveyed and grant- [* 227] ed to Pacheco's heirs, "according to the principles of equity," must be ascertained in this proceeding, to the end that the United States may grant the legal title, in satisfaction of the treaty; and a concession by leagues being the rule, and one extending to indefinite out-boundaries the exception, we hold that it was intended in this case to grant equal to *two leagues square*, situate within the given out-boundary; that is to say, four leagues in one tract, if so much is found in the general description and diseno.

The decree of the district court is therefore reversed, and the cause remanded to that court, to be further proceeded in, according to this opinion.

JOHN C. SINNOT and others, v. THE COMMISSIONERS OF PILOTAGE OF MOBILE.

22 H. 227.

CONSTITUTIONAL LAW—STATE LAWS GOVERNING VESSELS.

1. The act of congress of February 17, 1793, providing for the enrollment and license of vessels engaged in the coasting trade, is the supreme law of the land, and authorizes the vessels so licensed to engage in the coasting trade within the States.

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sion or authority to do that thing, and, if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize. It certainly transfers to him all the right which the grantor can transfer, to do what is within the terms of the license.

The license is general in its terms, according to the form given in the act of congress: "License is hereby granted for the said steamboat (naming her) to be employed in carrying on the coasting trade for one year from the date hereof, and no longer."

In the case already referred to, it was denied in the argument that these words authorized a voyage from New Jersey to New York. The court observed, in answer to this objection: It is true that no ports are specified; but it is equally true that the words used are perfectly intelligible, and do confer such authority as unquestionably as if the ports had been mentioned. The coasting trade is a term well understood. The law has defined it, and all know its meaning perfectly. The act describes with great minuteness the various operations of vessels engaged in it; and it cannot, we think, be doubted that a voyage from New Jersey to New York is one of those operations.

On looking into the act of congress regulating the coasting trade, it will be found that many conditions are to be [* 241] complied with by the owners of vessels, before the granting of the enrollment or license. 1. The vessel must possess the same qualifications, and the same requisites must be complied with, as are made necessary to the registering of ships or vessels engaged in the foreign trade by the act of December 31, 1792. These conditions are many and important, as will be seen by a reference to the act. 2. A bond must be given by the husband, or managing owner, and the master, with sureties to the satisfaction of the collector, conditioned that such vessel shall not be employed in any trade by which the United States shall be defrauded of its revenues; and also the master must take oath that he is a citizen of the United States; that the license shall not be used for any other vessel or any other employment than that for which it is granted, or in any trade or business in fraud of the public revenues, as a condition to the granting of the license. These are the guards and restraints, and the only guards and restraints, which congress has seen fit to annex to the privileges of ships and vessels engaged in the coasting trade, and upon a compliance with which, as we have seen, as full and complete authority is conferred by the license to carry on the trade as congress is capable of conferring.

Now, the act of the legislature of the State of Alabama imposes another and an additional condition to the privilege of carrying on this trade within her waters, namely: the filing of a statement in writing, in the office of the probate judge of Mobile county, setting forth: 1. The name of the vessel; 2. The name of the owner or owners; 3. His or their place or places of residence; and 4. The interest each has in the vessel. Which statement must be sworn to by the party, or his agent or attorney. And the like statement, *mutatis mutandis*, is required to be made each time a change of owners of the vessel takes place. Unless this condition of navigation and trade within the waters of Alabama is complied with, the vessel is forbidden to leave the port of Mobile, under the penalty of \$500 for each offense.

If the interpretation of the court, as to the force and effect of the privileges afforded to the vessel by the enrollment and license in the case of *Gibbons v. Ogden*, are to be maintained, * it can require no argument to show a direct conflict between this act of the State and the act of congress regulating this trade. Certainly, if this State law can be upheld, the full enjoyment of the right to carry on the coasting trade, as heretofore adjudged by this court, under the enrollment and license, is denied to the vessel in question.

If anything further could be necessary, we might refer to the enrollment prescribed by the act of congress, by which it is made the duty of the owner to furnish, under oath, to the collectors, all the information required by this State law, and which is incorporated in the body of the enrollment. Congress, therefore, has legislated on the very subject which the State act has undertaken to regulate, and has limited its regulation in the matter to a registry at the home port.

It has been argued, however, that this act of the State is but the exercise of a police power, which power has not been surrendered to the general government, but reserved to the States; and hence, even if the law should be found in conflict with the act of congress, it must still be regarded as a valid law, and as excepted out of and from the commercial power.

This position is not a new one; it has often been presented to this court, and in every instance the same answer given to it. It was strongly pressed in the New York case of *Gibbons v. Ogden*. The court, in answer to it, observed: "It has been contended, that if a law passed by a State, in the exercise of its acknowledged sovereignty, comes in conflict with a law passed by congress in pursuance of the constitution, they affect the subject and each

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other, like equal opposing forces." But, the court say, the framers of the constitution foresaw this state of things, and provided for it, by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of any act inconsistent with the constitution is produced by the declaration that the constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the State legislatures as do not transcend their powers, but, though enacted in the execution of acknowl-
[* 243] edged State powers, interfere with or are contrary * to the laws of congress, made in pursuance of the constitution, or some treaty made under the authority of the United States. In every such case, the act of congress or treaty is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it. The same doctrine was asserted in the case of *Brown v. the State of Maryland*, 12 Wh. pages 448, 449, and in numerous other cases. (5 How. pages 573, 574, 579, 581; 2 Peters, 251, 252; 4 Wh. pages 405, 406, 436.)

We agree, that in the application of this principle of supremacy of an act of congress in a case where the State law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together; and, also, that the act of congress should have been passed in the exercise of a clear power under the constitution, such as that in question.

The whole commercial marine of the country is placed by the constitution under the regulation of congress, and all laws passed by that body in the regulation of navigation and trade, whether foreign or coastwise, is therefore but the exercise of an undisputed power. When, therefore, an act of the legislature of a State prescribes a regulation of the subject repugnant to and inconsistent with the regulation of congress, the State law must give way; and this, without regard to the source of power whence the State legislature derived its enactment.

This paramount authority of the act of congress is not only conferred by the constitution itself, but is the logical result of the power over the subject conferred upon that body by the States. They surrendered this power to the general government; and to the extent of the fair exercise of it by congress, the act must be supreme.

The power of congress, however, over the subject does not extend further than the regulation of commerce with foreign nations and among the several States. Beyond these limits the States have

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not surrendered their power over the subject, and may exercise it independently of any control or interference of the general government; and there has been much *controversy, and [* 244] probably will continue to be, both by the bench and the bar, in fixing the true boundary line between the power of congress under the commercial grant and the power reserved to the States. But in all these discussions, or nearly all of them, it has been admitted, that if the act of congress fell clearly within the power conferred upon that body by the constitution, there was an end of the controversy. The law of congress was supreme.

These questions have arisen under the quarantine and health laws of the States—laws imposing a tax upon imports and passengers, admitted to have been passed under the police power of the States, and which had not been surrendered to the general government. The laws of the States have been upheld by the court, except in cases where they were in conflict, or were adjudged by the court to be in conflict, with the act of congress.

Upon the whole, after the maturest consideration the court have been able to give to the case, we are constrained to hold, that the act of the legislature of the State is in conflict with the constitution and law of the United States, and therefore void.

The judgment of the court below is reversed.

PHINEAS O. FOSTER and others, Plaintiffs in Error, v. THE COMMISSIONERS OF PILOTAGE OF MOBILE.

22 H. 244.

THE PRINCIPLES OF PRECEDING CASE APPLIED TO TOW-BOATS.

A steamboat licensed and enrolled under the act of 1793, engaged in towing and lightering between the lower bay of Mobile and the city, is engaged in the coasting trade; and the act of 1854 of the Alabama legislature is unconstitutional and void as applied to such a vessel. The doctrines of the preceding case govern this.

WRIT of error to the supreme court of Alabama.

This case, though similar to the preceding one, and argued by the same counsel, was supposed to differ, in that the tow-boat was engaged exclusively in domestic commerce.

The case is well stated in the opinion.

* Mr. Justice NELSON delivered the opinion of the court. [* 245]

This is a writ of error to the supreme court of the State of Alabama.

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The case is, in all respects, like the one just decided, except it is insisted that the steamboat was employed as a lighter and tow-boat upon waters within the State of Alabama, and therefore engaged exclusively in the domestic trade and commerce of the State.

According to the admitted state of facts, this boat was engaged in lightering goods from and to vessels anchored in the lower bay of Mobile, and the wharves of the city, and in towing vessels anchored there to and from the city, and, in some instances, towing the same beyond the outer bar of the bay, and into the Gulf to the distance of several miles. This boat was duly enrolled and licensed to carry on the coasting trade at the time she was engaged in this business, and of the seizure under the State law.

It also appears from the answer, and which facts are admitted to be true, that the port of Mobile is resorted to and frequented by ships and vessels, of different size in tonnage, engaged in the trade and commerce of the United States with foreign nations and among the several States; that the vessels of small size and tonnage are accustomed to come up to the wharves of the city, and discharge their cargo, but that large vessels frequenting said port cannot come up, on account of the shallowness of the waters in some parts of the bay, and are compelled to anchor at the lower bay, and to discharge and receive their cargo by lighters; and that the steamboat of claimants was engaged in lightering goods to and from said vessels, and in towing vessels to and from the lower bay and the wharves of the city.

[*246] *It is quite apparent, from the facts admitted in the case, that this steamboat was employed in aid of vessels engaged in the foreign or coastwise trade and commerce of the United States, either in the delivery of their cargoes, or in towing the vessels themselves to the port of Mobile. The character of the navigation and business in which it was employed cannot be distinguished from that in which the vessels it towed or unloaded were engaged. The lightering or towing was but the prolongation of the voyage of the vessels assisted to their port of destination. The case, therefore, is not distinguishable in principle from the one above referred to.

Judgment of the court below reversed.

SIDNEY E. COLLINS, Appellant, v. WILLIAM F. CLEVELAND and others.

22 H. 246.

THIS is a suit to set aside a conveyance of real estate, on the ground of a fraudulent advantage taken of the ignorance of complainant of the value of the property, and other facts material to the contract. Its discussion turned wholly upon the weight of evidence, and no principle of law is decided in the case.

APPEAL from the circuit court for the southern district of Alabama. The facts are very fully stated in the opinion.

Mr. Sewall, for appellant.

Mr. Smith and *Mr. Benjamin*, for appellees.

* Mr. Justice NELSON delivered the opinion of the court. [* 247]

This is an appeal from a decree of the circuit court of the United States for the southern district of Alabama.

The bill was filed by Collins, to set aside certain conveyances of a tract of land situate in the city of Mobile, and particularly a deed from him to the defendants, bearing date the 15th February, 1851, on the ground of fraud and imposition in the procurement of said conveyances.

The pleadings and proofs are very voluminous, the pleadings alone covering nearly one hundred, and, including the proofs, exceeding five hundred, closely printed octavo pages. The bill is very inartificially drawn, being stuffed with minute and tedious detail of what might have been proper evidence of facts constituting the ground of the complaint, instead of a concise and orderly statement of the facts themselves. This has led to an equally minute and extended statement of the grounds of the defense in the several answers of the defendants.

In looking closely, however, into the case, and into the nature and grounds of the relief sought, and principles upon which it must be sustained, if at all, it will be found that the questions really involved, as well as the material facts upon which their determination depend, are few and simple, and call for no very extended discussion.

The father of Collins, the complainant, died in 1811, seized of an interest in the tract of land in dispute. He left three sons, the complainant being then some two years old. The tract subsequently passed into the possession of one Joshua Kennedy, by collusion between Inerarity, the administrator of Collins the elder, and Kennedy, the latter also afterwards * obtaining [* 248]

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a deed of the land from the heirs at law by fraudulent representations.

In 1844, Thompson, one of the defendants in the present suit, residing in the city of Mobile, and having some knowledge of the original title of Collins to the land, and of the means by which the heirs had been deprived of it, visited the complainant, then residing in Texas, and being the only surviving heir, with a view to purchase his title, or to obtain an arrangement with him in respect to it, so that a suit might be instituted for the recovery of the estate. An arrangement was agreed to accordingly, and a conveyance of the land executed by the complainant and his wife to Thompson; also, a power of attorney, authorizing him to institute suits for the recovery of the land—Thompson, at the same time, executing a bond of indemnity to the complainant against all costs and responsibilities, in consequence of the suit. The complainant was to receive \$10,000, in the event of a recovery. A suit was subsequently instituted in the name of the complainant against the heirs of Kennedy, in April, 1844, in the circuit court of the United States for the southern district of Alabama; was heard upon the pleadings and proofs at the April term of the court, in 1847, and a decree rendered in his favor; which, on an appeal to this court, was affirmed at the December term, 1850. The case, as reported in this court, will be found in the 10th How. p. 174.

The litigation extended over a period of some seven years; and, in the progress of it, besides Thompson, who had made the original arrangement with the complainant, three other persons had become interested, and had contributed their services and money in bringing it to a successful termination.

After the affirmance of the decree in this court, and confirmation of the title in complainant, all the parties concerned met in the city of Mobile, at the office of the solicitors, for the adjustment of their respective claims to the property recovered. Its value had increased, during the progress of the suit, from about \$100,000, according to the estimate, to some two or three times that amount. The complainant had originally stipulated for the sum of \$10,000.

[* 249] In this adjustment, one-third * of the whole estate was set apart to him, and one-sixth to each of the other four persons. Conveyances according to this division were executed on the 15th February, 1851. The complainant, therefore, according to the general estimate, received \$100,000, and the other four associates \$50,000 each.

Now, the fraud alleged in the bill, and which is mainly relied on for setting aside this adjustment and division of the estate between

the parties, is placed upon two grounds: 1. In obtaining the deed of the land, powers of attorney, and other stipulations relating to the title, dated the 13th January, 1844, preparatory to the institution of the suit in which the property was recovered; and 2. In the adjustment and division of the property among the several parties above mentioned, after the recovery had taken place, and which was consummated by the deed of 15th February, 1851.

1. It is insisted, on behalf of the complainant, that, at the time he executed the deed, powers of attorney, and the other writings, in 1844, he was unacquainted with the value of the property or the condition of the title; that Thompson, who procured these instruments, and the authority to commence the suit, was well acquainted with both; that he fraudulently depreciated the value of the property, and exaggerated the difficulties and expense attending the litigation, and thereby deceived the complainant. This is the substance of the charge.

There is, however, a very brief but most conclusive answer to it, upon the pleadings and proofs in the case. It is that Mr. Justice CAMPBELL, whose firm had been subsequently employed by Thompson to bring the suit against the heirs of Kennedy, declined the retainer, and refused to have anything to do with it, unless the complainant should not only be made sole plaintiff in the suit, but should have a substantial interest in the estate sought to be recovered; should attend as the party in interest in conducting the proceedings, and take part in the preparation for trial; and insisted that the preliminary arrangement made by Thompson, including the deed of the property and agreement for the payment of the \$10,000, should be abrogated and given up. All of which was agreed to by Thompson and the other parties concerned; and the *suit was commenced and carried on to a final [* 250] determination, under this new arrangement. The complainant attended, and participated in the preparation of the case, assisted in procuring and in the examination of the witnesses, and admits, in his bill, that he attended every term of the court at Mobile, while the cause was pending, and until the decree in his favor.

The whole arrangement, therefore, between the parties, in respect to the property, entered into with a view to the institution of the suit, which is complained of, having been given up, and a new one substituted, which was not only unexceptionable, but highly equitable and just, as concerned the complainant, the charge of fraud and imposition depending upon it, even if originally it had any foundation, falls with it. We shall not stop to inquire into the

merits or justice of that arrangement, for, having been given up, they are wholly immaterial in any view of the case, as presented upon the evidence before us.

2. The remaining ground of fraud relied on in the bill is, that on the day of the arrival of the complainant at the city of Mobile, from his residence in Texas, and which was his first visit to the city after the judgment in his favor in this court, he was requested to attend at the office of the solicitors, in the evening, and attended accordingly, where he met the defendants, and was then, for the first time, informed that they had been interested in the prosecution of the suit, and had expended much time and money in the litigation, and were therefore expected to participate in the division of the property recovered. That complainant was taken by surprise when the suggestion was made at the meeting, by the solicitor, that, in the division, one-sixth part of the estate should be given to each of the defendants, and including Primrose, and only one-third to himself. That he was unprepared to act with judgment in the matter, having been wholly unadvised of the object of the meeting, or of the persons who were to be present; that no time was given him for reflection or counsel; that he was ignorant of the value of the property, and incapable of acting understandingly upon the subject, and had no information as to the amount he was thus suddenly called on to give away. * That a deed was immediately prepared by the solicitor, to carry into effect the division as suggested, and was executed; and that this meeting was arranged by preconcert, and after consultation between the defendants and others, for the purpose of entrapping and deceiving the complainant. The deed referred to is that of 15th February, 1851, which is sought to be set aside.

This is the second ground of fraud substantially as charged in the bill; and it will be necessary to look into the answers and proofs in the case, with a view to see if it is sustained.

The answer of Thompson, which is responsive to this particular charge, is a denial of every material fact and circumstance upon which the allegation of fraud rests. It states, that one or two days after the arrival of the complainant at Mobile, he requested him (the respondent) to go with him to the office of the solicitor that evening; that he had made an appointment with the solicitor to meet the respondent, and other persons interested in the suit, there, in order to come to an understanding and adjustment of their respective interests. The matters of the adjustment formed the subject of their conversation during the afternoon, and down to the time of the meeting. That the respondent explained to him

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the understanding he had with his associates, the other defendants, the services they had rendered in the suit, and the advances of money made therein; that, after all the parties had assembled at the office, the subject was again talked over at length, and, in the course of the conversation, the solicitor was referred to, and desired to suggest what, in his judgment, would be a reasonable adjustment and division of the property. Whereupon, he suggested a division into six parts—two parts to the complainant, and one to Thompson and each of his three associates; that this appeared to be generally acquiesced in, and it was proposed by some one that the papers should be drawn and executed. But the solicitor objected, and advised them to postpone the execution, and reflect upon the matter, and when they had come to a determination among themselves, it would be time enough to make out the papers; that the complainant expressed great pleasure and satisfaction at the division; * other of the parties were not satisfied. But, [* 252] in a few days, all met at the office of Primrose, one of the parties in interest, when the deed of the 15th of February, 1851, was voluntarily executed, carrying into effect the division.

The answer of Cleveland, another of the defendants, is equally explicit. He states that the subject of the division was talked over at the office of the solicitor; that all expressed satisfaction at the division suggested, except Primrose, who objected to the allowance of two shares to the complainant, he insisting that the time and labor of others had chiefly contributed to the success of the suit, and that complainant had originally expressed a willingness to be content with a small sum; that the solicitor repelled the idea, and said, that although others had been chiefly instrumental in carrying the case through, the title was in the complainant, and he ought to have the largest share; that the solicitor advised the parties to consider the matter, and, if he could aid them, to call on him; that the deed carrying into effect the division was not executed till several days, and respondent thinks a week, after this, at the office of Primrose.

James Campbell, another of the defendants, states that, after the meeting at the office, the subject of the interests of the parties was talked over; that upon the division suggested by the solicitor all concurred, except Primrose, who represented his claims higher than those of complainant; that he had rendered greater services and was entitled to a greater share. He depreciated complainant's title to the estate, insisting that he alone could have made nothing out of it, and had always said he would be satisfied with some negroes and cattle; that the solicitor replied to him, that without

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complainant's title there could have been no recovery ; and that, whatever others had done, still the title was in the complainant, and that he, the solicitor, had undertaken the suit with the distinct understanding and agreement that complainant was to have a substantial interest in the recovery. The respondent denies that the deed was drawn or executed the evening of the meeting, nor until several days afterwards.

These several answers are directly responsive to the [* 253] charges * in the bill, and are to be taken as true, unless overcome by the proofs. Instead of impeaching, the proofs are all in support of them.

Primrose, a witness on the part of the complainant, and who was one of the parties in interest, and present at this meeting, confirms the facts as above stated. In his answer to 43d interrogatory, he says, in substance, that, after conversation at the meeting relating to the subject before them, all seemed willing to leave the division to the solicitor, who thereupon suggested one-third to the complainant, and one-sixth to each of the others ; that he (the witness) objected, as giving too great a share to the complainant, and that he made some remarks about the condition of the title, when he and the others undertook the suit ; that complainant at that time had said he would be satisfied with a comparatively small sum, and that the solicitor replied to him, that the title to the property was in the complainant, besides making other observations which he (the witness) did not recollect.

This witness further says, in answer to the 43d cross interrogatory, speaking of the division, "All but myself did acquiesce. So far as I could judge, the complainant was satisfied, and I was disappointed." "Judge Campbell maintained Collins's right to two shares against me. The parties talked some of the matters over freely and considerably. It consumed a winter's evening, or greater part of it." "I do know Collins was pleased, and considered the settlement fair, just, and liberal towards him."

Judge Campbell, the solicitor, has also been a witness in the case. He states that after some reference to the subject at the meeting, and interchange of views, one of the parties stated that he was willing to abide by his opinion as to the share he should be entitled to, and others indicated a wish that he would make some suggestions as to the proper adjustment. In answer to which, he suggested a division of the property into six parts, and that two should be assigned to the complainant ; that Primrose expressed dissatisfaction, insisting the part to be assigned the complainant was too large ; that his title was good for nothing, and that the success

in the *suit was owing to the ability with which it was [* 254] prosecuted; that complainant did not expect so large a share; that he had said all he wanted was a few negroes and some cattle.

The witness further states, that he took pains to answer these objections; and, after some further conversation, the parties left his office; that he told them when they left to take into consideration what had been said, and that if he could be of any service to them, to call at his office again; that no agreement was arrived at that evening, and no papers drawn up of any agreement between the parties; that the deed of February, 1851, was not prepared by him till several days after this, and that he had not learned of its execution till the week after its preparation.

It is useless to pursue the inquiry further, as the proofs in the case are all one way, and show that there is no foundation whatever, not even colorable, for the charge of fraud set forth in the bill.

Besides the entire want of proof to sustain it, the evidence shows that possession of the property was taken by the parties jointly, after the settlement, in the summer of 1851. Extensive and valuable improvements were made in the course of the years 1852-'53, under the direction of the complainant and others. The sales in 1853 had amounted to \$92,000, as stated in the bill.

The property continued under the joint management of the parties for the period of some three years, without complaint or dissatisfaction on the part of Collins; when suddenly, without any apparent reason or changed condition of affairs between him and his associates, he seems to have taken up the delusion that he had been circumvented, and deceived into an inequitable settlement of the estate among the parties, in February, 1851, and for the first time set up a claim to the whole of it.

It is suggested in the bill, that the large sales made of the property in 1852-'53 afforded the complainant the first evidence of the great value of the estate; and it appears, from other portions of the case, that the increased and increasing value of the property had the effect to unsettle the views and *opin- [* 255] ions upon which he had acted in the settlement with his associates in February, 1851, and led to a strong desire to recall and review them.

But this suggested ignorance of the great value of the property at the time of the settlement is against all the proof in the case. His bill, filed against the heirs of Kennedy in April, 1844, for the recovery of this property, contains the following allegation: "Your orator charges that the said property was worth \$20,000 and up-

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wards in 1820, \$75,000 in 1830, and is probably worth \$200,000 at this time."

The great value of the property, compared with the consideration paid by Kennedy, was a very material fact in the case. Besides, the complainant had spent much of the time pending that litigation in the city of Mobile, in which the property was situate, and must have been familiar with its value, present and prospective. He was then in the prime of life, and possessed of more than ordinary intelligence in business matters, as is apparent from his correspondence, to be found in the record.

Having succeeded in the recovery, and obtained possession of the estate, he seems to have forgotten the obligations he was under to his associates. Their exertions and means had been mainly instrumental in raising him from poverty to affluence. They had advised him of his claim or title to the property, collected the necessary evidence to establish it, employed the counsel, and even furnished him (Collins) with the means of support, and to enable him to co-operate in the prosecution of the suit pending the litigation. The suit was severely contested, and was of some seven years' duration.

Still stronger evidence that, after his success, he was ready to forget his obligations to those mainly contributing to it, is the fact that his solicitor has not even escaped his insinuations of bad faith in his connection with the suit, though it was disclaimed on the argument by his counsel; thus contradicting all his opinions and feelings, strongly and repeatedly expressed pending the suit, and long after its termination and the settlement between the parties.

The solicitor had no interest in the property or in its distribution. His fee was not *dependent upon it. He was, therefore, wholly disinterested in the matter, and well situated to act as the friend of all parties in the settlement.

As we have already stated, before the commencement of the suit, he refused to be connected with it, unless the complainant should be permitted to have a substantial interest in the estate, and repudiated the arrangement by which he was to receive only \$10,000. After the recovery, and in the settlement among the parties, he stood firmly by this original understanding, and insisted that he should have a double share. So far as appears from the evidence, it is entirely owing to the sense of justice and firmness of Judge Campbell (the solicitor) that the complainant is now in the possession and enjoyment of some \$100,000 of his patrimonial inheritance, instead of the \$10,000 for which he himself had stipulated.

The decree of the court below is affirmed.

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JOSEPH KIMBROW, Plaintiff in Error, v. CUTHBERT BULLITT and others.

22 H. 256.

PARTNERSHIP—AUTHORITY OF PARTNERS TO BIND THE FIRM.

1. Though a partnership engaged strictly and solely in the business of farming by raising the productions of the farm has no occasion to draw bills of exchange, and one partner cannot bind the others by such bills, it is otherwise when the firm is also engaged in conducting a saw-mill, and buying and selling lumber. In such case the firm is properly a trading partnership, and can bind each other by drawing bills of exchange.
2. When, under such circumstances, the drawee accepts for the accommodation of the partnership, and pays the bill, it is no defense for one partner that the managing partner applied the money to the purchase of slaves, forbidden by the law when the purchase was made.

WRIT of error to the circuit court for the middle district of Tennessee. The case is fully stated in the opinion of the court.

Mr. Benjamin, for defendants in error.

No counsel for plaintiff in error.

* Mr. Justice CLIFFORD delivered the opinion of the court. [* 262]

This case comes before the court upon a writ of error to the circuit court of the United States for the middle district of Tennessee. It was an action of assumpsit brought by the present defendants against the plaintiff in error, to recover the amount of three several bills of exchange, particularly described in the declaration. As exhibited in the transcript, the several bills of exchange bear date at Lexington, in the State of Mississippi, on the second day of April, 1853, and purport respectively to have been drawn and addressed to the original plaintiffs by one Morgan McAfee, and by Dement, Kimbro & Sons. They were each for the sum of two thousand dollars, and were severally made payable to the order of the first-named drawer, by whom also they were duly endorsed. Two of them * were likewise en- [* 263] dorsed with the firm name of the other drawers. At the time the bills of exchange were executed, the original defendant was a member of the firm of Dement, Kimbro & Sons; and it was conceded, in the pleadings and at the trial, that the bills of exchange were drawn and negotiated by the senior partner of that firm. All the members of that partnership, except the defendant, were citizens of the State of Mississippi at the time the suit was commenced, and were residing out of the jurisdiction of the court; and for that reason, as alleged in the declaration, the other partners were not sued in this action. In the court below, the plain-

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tiffs claimed to recover against the defendant, upon the ground that the firm, of which he was a member, were the drawers of the bills of exchange, and that they, the plaintiffs, had paid the amount, or the principal portion of the same, out of their own funds, as acceptors, for the accommodation of the drawers. Without attempting to give any very definite analysis of the several pleas filed by the defendant, it will be sufficient for the purposes of this investigation to state that he set up two distinct grounds of defense in answer to the claim of the plaintiffs:

1. To the merits of the claim he pleaded the general issue, and denied specially that he ever drew the bills of exchange described in the declaration, or that he ever authorized any one to draw them in his name, or in the name of his firm.

2. For a further defense, he also alleged, in his fourth plea to the amended declaration, that the bills of exchange were drawn and endorsed by Dement, and accepted by the plaintiffs, for the purpose of raising money to be laid out in the purchase of slaves, to be imported from some other State or territory of the United States, for sale, into the State of Mississippi, which slaves he alleged to be afterwards purchased with the money and imported into the State, and there sold, according to the original intent, contrary to the form of the statute of that State in such case made and provided. To that plea the plaintiffs replied, traversing the allegations of fact, and tendering an issue, which was duly joined.

Some of the pleas resulted in issues of law, all of which [* 264] were ruled in favor of the * plaintiffs, and the defendants acquiesced in the rulings of the court.

Evidence was then introduced on both sides upon the issues involving the merits of the claim, and the court instructed the jury that Dement, the principal acting partner of the firm, had power to draw the bills given in evidence according to the proof adduced to them, if true; that if the bills were accepted and paid at maturity by the plaintiffs for the firm, the defendant was responsible, and it mattered nothing to the plaintiffs how the proceeds of the bills were disposed of, as that was a fact the plaintiffs could not know, and were not bound to prove.

Under the charge of the court, the jury returned their verdict in favor of the plaintiffs for the amount claimed, deducting certain admitted credits, according to the account exhibited in the transcript, and the defendant excepted to the instructions of the court. It is obvious, on the first reading of the instruction, that it contains two distinct propositions, and no doubt is entertained that both were intended to be controverted by the exceptions. In the

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first place, it affirms that the evidence adduced, if found to be true, was sufficient to show that the acting partner of the firm, of which the defendant was a member, had power to draw the bills of exchange described in the declaration. According to the proofs introduced by the plaintiffs, the firm commenced business at Lexington, in the State of Mississippi, in January, 1853, and the partnership was continued, without interruption, until the third day of October, of the same year, when it was terminated by the death of the senior partner. They also proved, by two witnesses, that the firm was engaged during that period in farming, carrying on a steam saw-mill, and in general trading. Both of these witnesses testified that the senior partner, who drew the bills of exchange in question, was the active business partner of the firm; and one of them added, that he did the principal trading, and borrowed money, and paid it back in the name of the firm.

Their partnership agreement was introduced by the defendant. It bears date on the fifth day of January, 1853; and the * partnership was formed, as recited in the instrument, to [* 265] continue for the term of two years, for the purpose of farming and of carrying on a steam saw-mill. By its terms, one-third of the capital stock was to be furnished by the senior partner, one-third by the defendant, and the remainder by his two sons. Those five persons constituted the firm, under the name and style before mentioned. And it was further stipulated that negroes or hands, stock, provisions, and all necessary utensils, should be furnished by the respective parties, according to their interest in the capital stock, and that they should defray the expenses of the co-partnership and share its profits in the same proportions. They also designated the farm to be carried on, and stipulated that the steam saw-mill should be located at such place as a majority of the partners in interest should determine.

After the partnership agreement was executed by the parties, it was deposited with a third person; and it appeared from his deposition, taken by the defendant, that it remained in his possession from that period to the time of his examination. In the same deposition, the witness testified that the firm, so far as he knew, had never been held out by the defendant as having any more extensive powers than those conferred by the partnership agreement.

Some attempt was made by the defendant to prove that it was the usage, in partnerships of this description, when money was wanted to carry on the business, and the several partners could not be consulted, for the managing partner to raise it on his own

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credit, and charge it to the partnership; but the proof was not sufficient to show any such general usage.

Such was the substance of the evidence on which the charge of the court was based, and we think it was of a character to justify that part of the instruction under consideration. Our reasons for that conclusion will now be briefly stated.

That one of several partners composing a trading firm has power to draw bills of exchange, unless restricted from so doing by the terms of the copartnership agreement, is a proposition which, it is presumed, no one will dispute. Whenever there are written articles of agreement between the partners, [* 266] *their power and authority, *inter se*, are to be ascertained and regulated by the terms and conditions of the written stipulations. But, independently of any such stipulations, each partner possesses an equal and general power and authority, in behalf of the firm, to transact any business within the scope and objects of the partnership, and in the course of its trade and business.

Acts performed by one of the partners, in respect the partnership concerns, and in the usual course of its business, differ in nothing, so far as their legal consequences are concerned, from those transactions in which they all concur; and for the reason, that, by the commercial law, each partner of a trading firm is presumed to be intrusted by his copartners with a general authority in all the partnership affairs. Accordingly it was held, in *Hawkin v. Bourne*, (8 Mee. and Wels. 710,) that one partner, by virtue of the relation he bears to the firm, is constituted a general agent for another, as to all matters within the scope of the partnership dealings, and has conferred upon him, by virtue of that relation, all authorities necessary for carrying on the partnership, and all such as are usually exercised in the business in which they are engaged. Any restriction which, by agreement among the partners, is attempted to be imposed upon the authority which one partner possesses, as a general agent for the other, is operative only between the partners themselves, and does not limit the authority as to third persons, who acquire rights by its exercise, unless they know that such restrictions have been made.

† Contracts made by one of several partners, in respect to matters not falling within the ordinary business, objects, and scope of the partnership, are not binding on the other partners, and create no liability to third persons, who have knowledge that the partner making the contract is acting in violation of his duties and obligations to the firm of which he is a member.† But whenever credit

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is given to the firm, within the scope and objects of the partnership, and in the course of its trade and business, whether the partnership be of a general or limited nature, it will bind all the partners, notwithstanding any secret stipulations or reservations between themselves, * which are unknown to those [* 267] who give the credit. *Harrison v. Jackson*, 7 Term. 207; *Pinckney v. Hall*, 1 Salk. 126; *Lane v. Williams*, 2 Vern. 277; *Swan v. Steele*, 7 East. 210; *Byles on Bills*, p. 31; 3 Kent Com. p. 40; *Story on Part. sec. 105*; *Collyer on Part. sec. 401*.

Apply these principles to the facts disclosed in evidence, and it is clear that the power of the acting partner was ample to authorize him to draw the bills of exchange in the name of the firm, unless it can be shown that the firm of which he was a member was not one falling within the general rules of law defining and regulating the rights and obligations of partners engaged in the transactions and business of trade.

All partnerships, says Chancellor Kent, are more or less limited; and there is none that embraces, at the same time, every branch of business. Such limitations are generally to be found in the terms and stipulations of the articles of copartnership; but they may arise from general usage, or, to a certain extent, from the character of the business, and the nature of the objects to be accomplished.

Partnerships are sometimes formed by those who are interested in real estate, for the mere purpose of farming; and in respect to that class of business arrangements, it has been held, that one of the several partners does not possess, by virtue of that relation merely, the right, without the consent of his associates, to draw or accept bills of exchange, for the reason that such a practice is not usual, nor is it necessary for carrying on the farming business. *Collyer on Part. (ed. 1848,) sec. 402*; *Greensdale v. Dower*, 7 Barn. and Cres. 635; *Dickerson v. Valpy*, 10 Barn. and Cres. p. 138, per Littledale, J.

In the case last named, it was held that a certain mining company fell within the same exception; and, on the facts disclosed, no doubt the question was well decided. But the mere circumstance that the business consists in making profits out of real estate, as in working a stone quarry, will not necessarily take the case out of the operation of the general rule. *Thicknesse v. Brownlow*, 2 Crompt. and Jerv. 425.

* Farming partnerships, when strictly confined to that [* 268] purpose, are held to be within the exceptions to the general rule, upon the ground, as assumed by the counsel for the plain-

tiffs, that their principal object is to make profits out of the soil, by gathering its fruits, and that the partners are in no proper sense engaged in trade; but wherever the business, according to the usual mode of conducting it, imports, in its nature, the necessity of buying and selling, the firm is then properly regarded as a trading partnership, and is invested with all the powers and subject to all the obligations incident to that relation. *McGregor v. Cleveland*, 5 Wen. 475; *Winship v. Bank of United States*, 5 Pet. 529; *Baker v. Wheeler*, 8 Wen. 505; *Coles v. Coles*, 15 Johns. R. 160; *Johnston v. Dutton*, 27 Alabama Rep. 245; *Hedley v. Bainbridge*, 3 Q. B. 321.

Another answer, however, may be given to the objection to this part of the instruction, which is entirely conclusive against it. According to the evidence, farming was not the sole business of the partners composing this firm. They were also engaged in running a steam saw-mill, for manufacturing purposes; and common observation will warrant the remark, that those who engage in that business always want capital to carry it on, and frequently find it necessary to ask for credit. Like those engaged in other branches of manufactures, they buy and sell, and have occasion to remit money and collect it from distant places.

Two witnesses also testified at the trial that this firm was engaged in general trading; and there was no evidence introduced by the defendant to contradict their statements. Whether the witnesses were entitled to credit, and whether, in point of fact, this firm was a trading firm, were questions which were properly submitted to the jury. By the verdict, both questions were found in favor of the plaintiff, and the finding of the jury is conclusive.

2. One other point only remains to be considered, which arises out of the second proposition contained in the charge of the court.

It was to the effect, that if the bills of exchange were accepted and paid at maturity by the plaintiffs for the * firm, then the defendant was reponsible, and it mattered nothing to the plaintiffs how the proceeds were disposed of.

No evidence was offered by the defendant in support of the issue raised by his fourth plea to the amended declaration, and there was none in the case tending to show that the proceeds had been applied to any illegal object, or in any manner misappropriated. Such being the fact, it is obvious that this part of the instruction became entirely immaterial; which, of itself, is a sufficient answer to the objection.

But another answer may be given to the objection, which perhaps will be more satisfactory; and that is, we think it was clearly

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correct. It will be observed, that this part of the charge was based upon the theory that the bills of exchange were drawn by the firm of which the defendant was a member; and properly so, for the reason that the question of authority to draw them had been disposed of in the preceding part of the charge.

In considering this objection, then, it must be assumed that the bills were drawn by the firm, and that they were duly accepted and paid by the plaintiffs at maturity, on account of the firm; and if so, it is not perceived how their right to recover the amount can be affected by the fact that one of the drawers applied the money to an unlawful purpose. Where a contract grows immediately out of and is connected with the illegal or immoral act of the party claiming the benefit of it, courts of justice will not lend their aid to enforce it. *Armstrong v. Toler*, 11 Wheat. 258.

But the illegal act, if any, in this case, was performed by one of the drawers of the bills, and not by the acceptors. Suppose one of a firm should borrow money of a third person, in the name of the partnership, and apply it to an unlawful purpose, it surely could not defeat the right of the lender to recover on the contract.

Regarding this point as too clear to be the subject of dispute, we forbear to pursue the discussion.

After a careful examination of the exceptions, we think they cannot be sustained. The judgment of the circuit court is therefore affirmed, with costs.

HENRY O. CLARK and others, Plaintiffs in Error, v. HENRY C. BOWEN and others.

22 H. 270.

POWER OF COURT TO VACATE JUDGMENTS—EFFECT ON NOTES ON WHICH THE JUDGMENT WAS CONFESSED.

1. One partner cannot confess a judgment against himself and other partners, so as to bind the latter by reason of the partnership alone.
2. Where such a judgment is set aside as to the partner not joining in the confession, it should, on motion of the plaintiff, be set aside as to the other partners also.
3. This revives the notes on which judgment was rendered, so as to sustain a suit on them against all the partners.
4. An assignment made to secure the judgment so confessed will fall with the judgment when it is set aside.

WRIT of error to the district court for the district of Wisconsin.

The plaintiffs in error constituted a partnership composed of Henry O. Clark, Ira Clark, and A. Hyatt Smith. A judgment

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was confessed by this firm in favor of Bowen & McNamee, on notes amounting to \$7,950.75, and assignment of their goods made to Bowen & McNamee, to secure the payment of the judgment. Smith, who was absent when the judgment was confessed, had it set aside, as to him, as being made without authority. The assignment was held void in equity. Thereupon Bowen & McNamee had the judgment set aside as regards the two Clarks also, and brought the present suit on the original notes. The defendants, now plaintiffs in error, insisted that the notes were merged in the judgment, and the action could not be maintained.

Mr. Doolittle, for plaintiffs in error.

Mr. Lynch, for defendants.

[* 273] * *Mr. Justice CATRON* delivered the opinion of the court.

We deem it to be a matter not open to controversy in this suit, that the State court of Rock county properly vacated its own judgment, as respected Clark and Justin, after Smith, the solvent partner, had been released from it—because Clark had no power to bind Smith by the confession; and secondly, because the goods that were assigned to a trustee to secure the judgment had been taken from the assignee, by a previous mortgage of them.

The following admission is found in the bill of exceptions, and is conclusive of the merits of this controversy:

“It is conceded by defendants, that the judgment in the circuit court was confessed at the time of the execution of the assignment, and that the assignment was to secure the judgment, and the judgment and assignment were the mode adopted to secure the plaintiffs’ debt; and that Clark executed the assignment and judgment for Smith.”

The whole arrangement to secure the debt being in effect annulled, the original indebtedness stood revived, and was properly enforced by the judgment of the circuit court—which we order shall be affirmed.

THE UNITED STATES, Appellants, v. RAFAEL GARCIA.

22 H. 274.

CALIFORNIA LAND GRANTS.

Claimant shows an order of 1844 from Micheltorena, governor of California, authorizing him to search for and settle upon land, with a view to a future grant, a petition for the land to Governor Pico in 1846, and a reference to the alcalde for information, and

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the report of this officer that the land was not private property. This, with proof of possession under the first order, was all claimant's evidence: Held, that it showed no grant or other vested rights, and the claim must be rejected.

APPEAL from the district court for the northern district of California. The case is sufficiently stated in the opinion.

Mr. Stanton and *Mr. Black*, attorney general, for the United States.

Mr. Benham, for appellee.

* *Mr. Justice CATRON* delivered the opinion of the court. [* 280]

The question in this case is, whether the land claimed was private property when we acquired California by treaty, or whether it then was part of the public domain of Mexico, and now belongs to the public lands of the United States.

1. If it was private property, it must have become so by the grant of a vested interest, that was good in equity; made by the granting power in the territory of California, being authorized to exercise the sovereign power, as no other authority could divest the public title.

2. If the land in dispute was acquired by the United States, as public property, then the courts of justice have no jurisdiction of the subject matter, and cannot interfere. This is a postulate, not open to controversy. *United States v. Forbes*, 15 Peters, 182.

That the Mexican authorities, exercising the granting power in California, conferred no title on Garcia, we think satisfactorily appears, for the reasons set forth in the opinion of Judge Hoffman, delivered in the district court, and found in the records, the most material parts of which opinion we adopt. The district judge says:

"In support of his claim, the appellant exhibits an order of Michelterona, dated November 15, 1844, which is as follows: 'According to your memorial of the 14th instant, you ask for the grant of a passport to penetrate into the points of the coast on the northern line of this country, with the object of locating a tract of land of the extent of eight to nine leagues, since that which you now occupy with your personal property is so limited. By this order, you are empowered to appear before the * military [* 281] commanding authority of that frontier, in order that, after an examination, you may proceed to your research after the tract of land you ask for, as a recompense for the services rendered by you to the nation.

" 'If you should happen to select any tract of land, you are em-

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powered to occupy it with your said property, and to take possession of it while the usual procedure is being prosecuted, presenting the requisite sketch.

“‘God and liberty.

MANUEL MICHELTORENA.

“‘*Monterey, November 15, 1844.*

“‘*To Don Rafael Garcia, at his rancho.*’

“Availing himself of the permission thus granted, the claimant appears to have selected a tract of land, and to have occupied and improved it to some extent. No steps, however, were taken by him to obtain a title until March 4th, 1846, when Garcia addressed a petition to Gov. Pico, in which, after referring to the order of Micheltorena, he solicits a grant of the land. Gov. Pio Pico, by a marginal order, dated April 7th, 1846, referred the petition to the alcalde of San Rafael, for the usual *informe*. On the 29th of April, 1846, the alcalde reported that the land did not belong to any private individual. The foregoing constitutes all the evidence of title produced by the claimant. It is not pretended that any grant was ever issued for the land, or that any further action whatever was taken by Pio Pico on receiving the alcalde’s *informe*. Whether he determined not to grant the land, or whether he omitted to do so in consequence of the distracted condition of public affairs, we are ignorant. One fact is clear: no grant was obtained by the claimant.

“A mere petition to search for land, such as that given to the present claimant, finds no place in the Mexican system.

“The application of Garcia to Micheltorena was for a passport to enable him to search for land. In granting this, and also the permission to put his cattle upon the tract he might select, Micheltorena in no respect bound himself or his successors to issue a final title. Such seems to have been the view of Pio Pico and the claimant himself, for a petition, accompanied by the usual [* 282] *diseno*, is formally presented to * that officer, and by him referred for information, as in other cases.

“If this claim is to be confirmed, every provisional license or permission temporarily to occupy land must be held to constitute an equitable title, provided the claimant has availed himself of the permission—a ruling which would astonish no one more than the old inhabitants of the country, by whom the importance of obtaining a ‘title’ from the governor was well understood.

“For aught we know, Pio Pico, when the petition was subsequently presented, found it inexpedient to grant the land; and if the claimant, under a mere permission to occupy it with his cattle, has built a house upon it, and for two years omitted any effort to

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procure a title, he must attribute the loss of the land to his own neglect."

The board of commissioners unanimously rejected the claim, from whose decision Garcia, the claimant, appealed to the district court. There the judgment of the board was reversed, on a division of opinion, and a decree entered, confirming the claim, probably with a view of transmitting the cause to this court for final determination.

For the reasons above stated, it is ordered that the decree of the district court be reversed. And the court below is directed to dismiss the petition; for which purpose, the cause is remanded.

McMICKEN'S EXECUTORS, Appellants, v. FRANKLIN PERIN.

22 H. 282.

EQUITY—BILL OF REVIEW.

1. A bill of review, founded on an allegation of fraud in procuring the original decree, cannot be sustained on that ground when the fraud is denied in the answer, and there is no sufficient evidence to sustain it.
2. Nor will such a bill be sustained when the original decree was obtained by the neglect of the party seeking a review to defend the original suit.

APPEAL from the circuit court for the eastern district of Louisiana.

The case has been twice in this court before, and is reported in 18 How. 507; 1 Miller, 433, and 20 How. 133; 2 Miller, 321. In its present aspect it is sufficiently stated in the opinion.

Mr. Benjamin, for appellants.

Mr. Day and *Mr. Perin*, for appellee.

*Mr. Justice NELSON delivered the opinion of the court. [* 283]

This is an appeal from a decree of the circuit court of the United States for the eastern district of Louisiana.

The bill filed by McMicken in the court below is in the nature of a bill of review, praying relief from a decree obtained against him by Perin in a previous suit by means of fraud and imposition.

The suit by Perin charged McMicken with holding, in trust for his use, a valuable sugar plantation, situate in the parish of East Baton Rouge, on the Mississippi river, in the State of Louisiana; and sought a discharge of the trust and a conveyance of the title to the complainant.

The bill of review sets forth as the ground of fraud in the decree, that after the commencement of the former suit and service of the

[* 284] subpœna on McMicken, in an interview with * Perin on the subject of the suit, he agreed to discontinue it, and prosecute the same no further; upon which understanding the defendant acted, and discharged the solicitor retained to defend it, and omitted altogether any defense; and that in violation of the agreement, and in fraud of the rights of the defendant, he, Perin, proceeded with the suit in the absence and without the knowledge of the defendant, obtaining the decree in question by default, declaring the trust, and directing a conveyance of the plantation.

The bill of review further sets forth that the advances made by the complainant in the purchase of the property, and the liabilities incurred by way of raising encumbrances on the same in securing the title, far exceeded the sum stated by Perin in his bill, and which he proposes to reimburse and satisfy, and of all which he had full knowledge, but which he fraudulently suppressed and excluded from the decree, which the complainant is justly entitled to have allowed upon setting aside the purchase and declaring the trust for the benefit of Perin.

The defendant, in his answer to the bill of review, denies specifically the fraud charged therein against him; denies that he agreed to give up the suit, and not further prosecute the same, or that he gave any assurances to McMicken to that effect, or which were calculated to mislead or induce him to withdraw from the defense, or that any such understanding existed between the parties; but, on the contrary, since the filing of his bill he has, at all times, insisted upon his rights as set forth therein, and upon the prosecution of his claim to the property.

The defendant also denies that the omission to set forth in his bill any other sums than those allowed in the report of the master, and which entered into the decree, were with a view to an *ex parte* proceeding in the suit as charged by McMicken, and denies all fraud or concealment in respect to these accounts.

The answer of the defendant is directly responsive to the charges in the bill, and relates to facts within his knowledge, and, upon well-settled principles of pleading, must be taken [* 285] * as presenting the true state of the case, unless overcome by the proofs. The complainant, in view of this rule, has examined witnesses in support of the allegations, but they have wholly failed to sustain them.

The bill of Perin against McMicken to enforce the trust was filed in February, 1851. The subpœna was served personally in November, 1852. McMicken resided in the State of Ohio, and the service in the suit could be made only in the State of Louisiana. The

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decree *pro confesso* was entered in April, 1853, and the final decree in June, 1854. The suit seems not to have been hurried with any unusual speed to its final determination.

In February, 1855, a petition was presented to the court containing, substantially, the facts set forth afterwards in the bill of review, on behalf of McMicken, to set aside the decree, and to permit him to come in and defend, which, after hearing, was denied. Whereupon an appeal was taken to this court from the decree in the suit, and also from the order refusing to set aside the decree, and which were affirmed in December term, 1855, (18 How. 507; 20 *ib.* 133.)

The present bill was filed for a review of the decree and order thus affirmed by this court in January, 1857. The case was heard on pleadings and proofs, and a decree entered dismissing the bill in November of the same year, and is now before us on appeal.

The bill was dismissed upon the ground that the excuse set up by the complainant, to wit, the fraud and imposition of Perin, for not appearing and defending the former suit, was fully and completely denied in the answer, and wholly unsupported by the proofs. The failure, therefore, of the defendant to appear and defend, and his rights in that suit, for aught that was shown, was attributable to his own neglect and inattention.

The allegations upon which relief in the bill rested, and upon which alone a rehearing could be granted in the case, consistent with the established practice of a court of chancery, were unsustained.

This is familiar doctrine, and is decisive of the case.

The decree of the court below affirmed.

THE UNITED STATES, Appellants, v. THE WIDOW, HEIRS, AND EXECUTORS OF WM. E. P. HARTNELL.

22 H. 286.

CALIFORNIA LAND GRANTS.

1. The laws of Mexico concerning grants of land permitted one league of irrigable land, four leagues of farming land, not irrigable, and six for pasturage or stock raising, and no more, to one person.
2. The departmental assembly, for this reason, reduced the present grant to eleven leagues, and this was properly done.
3. The action of the departmental assembly is conclusive, because, by the laws of Mexico, it had the right to confirm, reject, or modify the concessions of the governor.

APPEAL from the district court for the northern district of California. The case is well stated in the opinion.

Mr. Stanton, for the United States.

Mr. Benham, for the appellees.

[* 288] * Mr. Justice CATRON delivered the opinion of the court.

Hartnell got a grant from Governor Alvarado, dated June 28, 1841, for a body of land lying in Lower California. The quantity is not specified in the grant, the out-boundaries only being designated.

In November, 1844, he obtained another grant for eleven square leagues, lying in Upper California. Both claims were duly set forth in a petition seeking confirmation, before the board of land commissioners, and they were confirmed, with modifications—the lower grant to the extent of five leagues, and the upper for six leagues.

From this decree the parties appealed, and brought their cause to the district court, held at San Francisco. That court, sitting in the upper district, had no jurisdiction to re-examine the judgment of the board, as respected the five leagues confirmed in the district of Lower California; and as to that tract, the appeal was dismissed, and therefore that title stands confirmed.

There being cross appeals, the question arises here, whether the upper grant should be confirmed for six leagues or for [* 289] * eleven—the grant of the governor calling for the latter quantity.

The district court adjudged six leagues as the proper quantity; and on this single point the cause comes before us—both parties being satisfied with the decree below in all other respects.

The narrow question is, had the governor of California power, in 1844, to grant gratuitously, for the purposes of tillage, inhabitation, and pasturage, more than eleven leagues of land to any one person? Section 12 of the law of 1824 provides, that it shall not be permitted to *unite* in one hand, as property, more than one league of irrigable land, four leagues of farming land, not irrigable, and six for stock raising.

Both titles of Hartnell were brought before the departmental assembly. That body held the law to be, that the governor could not “*unite in the same hand*” more than eleven leagues, although it might be in different tracts; and so reported to him.

The public *domoin* was the property of the Mexican nation, and those who were enabled to displace that title, separate portions of it from the public lands, and vest such portions into individual

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proprietors by perfected titles, could only do so in the exercise of sovereign power, because the public title was a sovereign right; and agents who assumed to exercise this authority must show that they represented the nation. The governors of California do not show that they did represent the nation, so as to *conclusively* bind it; to have this effect, the governor's grant must have the concurrence of the departmental deputation. It follows, that the assembly was the controlling power, and could reform or *nullify* the governor's grant; and having reformed it to the extent of five leagues in the case before us, the claimant came in under the treaty of peace with Mexico, having no interest in these five leagues. 8 How. 303, 304.

We have no doubt that the departmental assembly, the board of commissioners, and the district court, construed the law of 1824 (section 12) correctly, and order the decree below to be affirmed in all its parts.

THE EXECUTORS AND HEIRS OF YTURBIDE, Appellants, v. THE UNITED STATES.

22 H. 290.

CALIFORNIA LAND GRANTS.

The 12th section of the act of 1852, concerning appeals from the board of commissioners, enacts that the appeal from the decree of the board shall be considered as dismissed, unless notice of the appeal be given within six months after the transcript is filed with the court: Held, that this provision is mandatory, and neither sickness of counsel nor other hardship can enable the district court to hear the appeal where the notice is not given within the time required by the statute.

APPEAL from the district court for the northern district of California. The case is stated in the opinion.

Mr. Blair, for appellants.

Mr. Stanton, for the United States.

* Mr. Justice McLEAN delivered the opinion of the court. [* 291]

This is an appeal from the district court of the United States for the northern district of California. A grant of twenty leagues square of land, equal to four hundred square leagues, was made by the supreme government of Mexico to President Yturbide, to be located in Texas, on the 25th February, 1822, "in recompense for his high merit, in having achieved the independence of his country."

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In 1835, the congress of Mexico authorized his heirs to locate the land in New Mexico, or in Upper or Lower California. On the 20th of February, 1841, it was decreed by the president that the land should be located in Upper California; and on the 5th of June, orders were given by the president to the governor of California to assign the land selected by Salvador de Yturbide, one of the heirs, in fulfillment of the grant, and the order was [* 292] duly received by Pio Pico; but * when Salvador was near Mazatlan, en route for California, to locate and take possession of the land, he found that port in rebellion, and was obliged to return to Mexico.

The claimants took no further proceedings till after the close of the war with the United States, and congress had passed laws to carry into effect the treaty stipulations. They proceeded then to locate the claim on the tract described on the map, and presented their petition to the board of commissioners, asking for the confirmation of the grant. The board rejected the claim, on the ground that it had not been located prior to the change of government.

An appeal was taken to the district court, under the act of 1852; but the counsel of appellants, being detained from home by sickness, did not file the notice, directed by the act to be given within six months. Before any motion was made to dismiss the cause, they moved the court for leave to file the notice, *nunc pro tunc*, and proved, to the satisfaction of the court, that the omission to file the notice was wholly accidental; and the court thereupon allowed the motion, and ordered the notice to be filed *nunc pro tunc*. But, on the hearing of the cause, the court decided that, under the statute of 1852, a failure to file the notice within six months precluded any further prosecution of an appeal, under any circumstances whatever, and therefore dismissed the appeal.

The district court, it is said, dismissed the appeal, on the ground that its own order, allowing the notice of appeal to be filed *nunc pro tunc*, was void.

As the above statement is clear and concise, it was copied from the plaintiff's brief.

The counsel insists, that the allowance of the appeal, after the time limited, was not void; that the language of the statute, that "the appeal shall be considered as dismissed, in case the notice shall not be filed as required," is directory merely.

It must be admitted, that, as to the matter of filing papers and the entry of rules under the practice of the court, such modifications may be made as may facilitate the progress of the court and the

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convenience of parties; and, indeed, the court may, under peculiar circumstances, avoid an act of injustice * by the [* 293] suspension of its rules; but this can only be done where the discretion of the court may fairly be exercised.

Where an entry is required by statute, on a condition expressed, the court is bound by the statute. The language of the *act*, that "the appeal shall be considered as dismissed" where the notice is not filed as required, would seem to admit of no doubt. "If the appeal shall be considered as dismissed," for want of notice, how can the court say it shall not be so considered?

If there be no saving in a statute, the court cannot add one on equitable grounds. The 12th section of the act of 31st August, 1852, provides that, in every case in which the board of commissioners shall render a final decision, it shall be their duty to have two certified transcripts of their proceedings and decisions, and of the papers and evidence on which the same were founded, made out, one of which transcripts shall be filed with the clerk, shall *ipso facto* operate as an appeal for the party against whom the decision shall be rendered; and if such decision shall be against the private claimant, it shall be his duty to file a notice with the clerk of the court, within six months thereafter, of his intention to prosecute the appeal; and if the decision shall be against the United States, it shall be the duty of the attorney general of the United States, within six months after receiving the said transcript, to cause to be filed with the clerk aforesaid a notice that the appeal will be prosecuted by the United States; and on the failure of either party to file such notice with the clerk, the appeal shall be regarded as dismissed.

This seems to be mandatory on the court, and authorizes the exercise of no discretion.

THE UNITED STATES, Appellants, v. THE HEIRS OF FRANCISCO DE HARO.

22 H. 293.

CALIFORNIA LAND GRANTS—POSSESSION.

1. Where there is an apparent alteration in the date of a grant, but which is to the prejudice of the claimant, he will not be held responsible for it when the true date has been established.
- 2 Sixteen years' possession and occupation of the lot, with a house on it, under a grant from Alvarado, to which the only objection against the claimant is the alteration of date, should remove the difficulty, and the claim is confirmed.

THIS is an appeal from the district court of the United States for

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the northern district of California. The case is well stated in the opinion.

Mr. Stanton, for the United States.

Mr. Phillips, for appellees.

[* 294] * *Mr. Justice McLEAN* delivered the opinion of the court. The petition of the heirs of Francisco de Haro represents:

That on the 30th July, 1843, the father of your petitioner made and presented his petition in writing to Alvarado, governor of California, soliciting for himself the grant of a lot of land in the mission of Dolores, to which he had previously obtained a provisional grant of Jose Ramon de Estrada.

That on the 16th of August, 1843, said Francisco obtained a formal grant of said Alvarado to the lot so petitioned for, and remained in possession thereof up to the time of his decease; and that, from that time up to this day, your petitioners have been and still are in the quiet and undisputed possession of said land.

That said land is situated in the mission Dolores, and in the block known and laid down on the official map of San Francisco as block No. 37, and forms the northeast of Centre and Dolores streets, containing fifty Spanish varas square—which grant has properly been recorded in the archives of California—and that the original documents are herewith submitted to the inspection of your honorable board.

[* 295] * Francisco Sanchez was sworn, as to the genuineness of the grant, and he says: I never saw the paper before, but I have no doubt it is genuine. I am acquainted with the signatures of Francisco de Haro and Juan B. Alvarado, having often seen them write; and I recognize their signatures, as they appear on said document, as their genuine signatures.

There were some old houses on the land at the time of the grant, which had belonged to the mission. These were repaired by Francisco de Haro, and in 1846 he was living in them. The land had been enclosed since by his son-in-law, Charles Brown. De Haro died there in 1848. The house was repaired by De Haro.

Francisco de Haro, over his own signature, represents: "That being established in the establishment of Dolores, in houses of the name called 'mayor domos,' opposite the principal house and plaza; and, as I obtained them from the prefect of the 1st district, Don Jose Ramon Estrada, I solicit of your excellency the legitimacy in property, for the expenses that I have to make to repair

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them, to live therein with my family, in virtue of my services rendered, receiving grace from your excellency, by adding fifty varas eastward of the houses, inasmuch as I beg most humbly, &c."

MONTEREY, *August 16, 1843.*

MOST EXCELLENT SIR: Whereas the citizen Francisco de Haro has rendered interesting services to the nation and to the departmental government, and in virtue of his being already in possession of the houses solicited by previous consent of the government, as it is shown by the concession of the prefect of the district, I have concluded by these presents, in conformity and ratifying said concession jointly with the fifty varas to the eastward of said houses, as solicited.

The judge of San Francisco will have it so understood, for the cases that may occur upon informations in relation to the new town of Dolores.

ALVARADO.

This claim was at first held not to be valid, and was consequently rejected by the commissioners. From this decision there was an appeal to the district court. On this appeal a *wit- [* 296] ness, Candelario Valencia, was sworn, who says he is forty-eight years of age, and resides in the mission of Dolores, San Francisco county, California. The witness first knew Francisco de Haro about thirty years since. He is now dead; he died in 1847 or 1848, at the mission of Dolores, and in the building now occupied by Louis Pruso, which is on the northeast of Centre and Dolores streets. The lot on which this house is situated is a fifty-vara lot.

To the question, who are the heirs of Francisco de Haro? the witness answers: At the time of his death he left eight children—one died without issue; the names of those living are as follows: Josefa de Haro, wife of James Dennison—she was formerly wife of Guerrera, now dead; Rosalia de Haro, formerly wife of Mr. Andrews, deceased—now wife of Charles Brown; Natividad, formerly wife of Ignacio Castro, deceased, and now of Paul Tissot; Prudencia, unmarried; Candelaria, unmarried; Charlotta, wife of Fish. Dennison, brother of James; and Alonzo, not yet of age. Francisco de Haro lived in the house ten years. It was formerly part of the establishment of the mission, and was occupied by the mayor domos; it fronts upon the plaza of the mission, and also is opposite the principal house of said mission. Since the death of Francisco de Haro, it has been occupied, and is still, by the tenants of his heirs. Dolores and Centre streets have always existed, since the mission was established, but had not their present names; in

fact, they had no names. This lot in question had the same position that it now has; a surveyor, without any difficulty, could locate said lot.

The witness says that he has lived at the mission Dolores for the last sixteen years, and has seen all that he has testified to.

The final decree of the circuit court before both the judges was as follows :

This cause came on to be heard upon the transcript of the proceedings in the board of the United States land commissioners, &c., and upon the proof taken in this court upon the appeal from the decision of the said board, taken therefrom by the complainant; [* 297] and upon hearing counsel for appellants and * respondent, and due deliberation being thereupon had, &c., it is ordered, adjudged, and decreed, that the decision and decree of the said board be and the same hereby is reversed.

And it is further ordered, adjudged, and decreed, that the claim of the said appellants to the land claimed by them is valid, and that the same be, and hereby is, confirmed to them.

The land whereof confirmation is made is that certain fifty-vara lot, situated in the mission Dolores, on the northeast corner of what are known as Centre and Dolores streets, on which lot there is a house which formerly formed a part of the establishment of the mission Dolores, occupied by the mayor domos thereof—said lot fronting on the plaza, opposite to the principal house of said mission, and which lot was in the occupancy of Francisco de Haro, for some years previous to his death, and has been recently in the possession of one Louis Pruso, as tenant of the claimant, together with and adding fifty varas to the eastward and immediately adjoining said houses.

Subsequently, a notice was served on the district attorney, that the counsel for the complainants, will move the court, on the 14th of September, 1857, on that day, or as soon thereafter as counsel can be heard, that the decree entered in this cause be reformed, by adding to the description of the property confirmed by the said decree, "together with the parcel of land fifty varas square, to the eastward thereof. San Francisco, September 10th, 1857."

Afterwards, on motion of the district attorney of the United States, "it is ordered that the decree heretofore rendered at this term in the above case be set aside, and that the cause stand for reargument at the next term of this court."

And the final entry, upon filing and reading the affidavit of B. S. Brooks, and upon inspection of a traced copy of the original grant of title, whereof confirmation was heretofore made, certified

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in due form from the office of the surveyor general, from which it manifestly appears to the court that the said grant was originally made and dated by Governor * Alvarado during [* 298] his term of office, and that the date which it now bears is an evident alteration against the interests of the claimants, and therefore not to be imputed to them; and upon filing a notice of motion and due proof of service thereof upon the district attorney of the United States, and counsel having been heard for both parties, on motion of Mr. Williams, of counsel for the claimants, it is ordered that the order heretofore made in this cause, setting aside and vacating the decree heretofore made confirming the claim, be, and the same is hereby, vacated, set aside, and annulled, and said decree revived and reinstated.

From this decree there was an appeal to the supreme court of the United States by the government.

"It appears that an undisturbed possession of the property claimed has been in the possession of Francisco de Haro and his heirs sixteen years, and it does not appear that any one has claimed or exercised a possession or right of possession over the premises. The copy of the original grant of title, whereof confirmation was heretofore made, certified in due form from the office of the surveyor general, from which it manifestly appears to the court that the said grant was originally made and dated by Governor Alvarado during his term of office, and the date which it nows bears is an evident alteration against the interests of the claimants, and therefore not to be imputed to them." This being the language of the court, imparts verity to the grant, and would seem to settle all doubt on the subject.

There were some old houses on the land at the time of the grant, which belonged to the mission, but it would seem no longer belong to it.

Upon the whole, we cannot doubt, from the title papers, and especially from the sixteen years' possession which has been enjoyed by De Haro and his heirs—using the property as their own, claiming it under the grant—that the title should be confirmed; and it is hereby confirmed.

THE UNITED STATES, Plaintiffs in Error, v. JOHN J. WALKER and others.

22 H. 299.

COMPENSATION OF COLLECTORS OF CUSTOMS.

1. The limitation of the salary of collectors of the non-enumerated ports, under the act of May 7, 1822, to \$3,000, is not repealed by any subsequent act of congress.
2. But, by the act of March 3, 1841, they are entitled to receive whatever profits are made from rent and storage, beyond the rent paid out, to the amount of \$2,000.
3. But any sum beyond the \$2,000 so received must be paid into the treasury of the United States.

WRIT of error to the circuit court for the southern district of Alabama. The case is very fully stated in the opinion.

Mr. J. Mason Campbell and *Mr. Black*, attorney general, for the United States.

Mr. Smith and *Mr. Stanbery*, for defendant.

[* 303] *Mr. Justice CLIFFORD delivered the opinion of the court.

This case comes before the court upon a writ of error to the circuit of the United States for the southern district of Alabama. It was an action of debt brought by the United States upon the official bond of the defendant as collector of the customs for the district and inspector of the revenue for the port of Mobile. He gave the bond, with sureties, on the seventh day of September, 1850, conditioned that he had truly and faithfully executed and discharged, and that he would continue truly and faithfully to execute and discharge, all the duties of the office according to law. Neglect and refusal on the part of the defendant to pay to the plaintiffs certain sums of money received by him as such collector before the commencement of the suit, beyond what he was entitled to retain as compensation for discharging the duties of the office, constituted the breaches of the condition of the bond, as assigned in the declaration.

Those balances, as claimed by the plaintiffs, amounted to the sum of thirteen thousand one hundred and eighty-four dollars and forty-two cents; and the charge was, as alleged in the declaration, that the defendant had wholly failed and refused to pay the same. As appears by the transcript, the defendant pleaded the general issue, and that he had fully performed the conditions of the writing obligatory set forth in the declaration.

To maintain the issue on their part, the plaintiffs introduced a certified copy of the bond given by the defendant, and two duly

certified copies of transcripts from the treasury department, showing that the official accounts of the defendant had been examined and adjusted by the accounting officers of that department. According to those transcripts, the respective balances claimed by the plaintiffs, as the accounts are there *stated, had not [* 304] been paid by the defendant, and remained due and payable at the time the suit was commenced.

No evidence was adduced by the defendant. He was charged in the account against him, as collector of the customs, with all sums collected from duties on merchandise, tonnage duties, hospital money, and for all sums received for rent and storage of goods, wares, and merchandise, stored in the public storehouses, for which a rent was paid beyond the rents paid by the collector. On the other side, he was credited in the account of official emoluments with the sum of three thousand dollars as the maximum rate of the annual salary or compensation allowed to the collector of that port. Further details of those accounts are omitted, for the reason that the charge for rent and storage in the account of customs, and the credit for salary in the account of official emoluments, are the only two items which come in review at the present time.

Reference to the ninth section of the act of the seventh of May, 1822, will show that Mobile is not one of the seven ports enumerated in that provision, and consequently that the maximum rate of annual compensation or salary allowed to the office under that law was three thousand dollars, as limited by the tenth section, which includes all the ports not enumerated in the previous provision. All of the accounts of the defendant were adjusted at the treasury department upon the principle that the act of the seventh of May, 1822, was still in force, and that the maximum rate of compensation belonging to the collector was three thousand dollars, as therein prescribed. It was insisted by the defendant that the provision in question had been repealed by subsequent acts upon the same subject, and that the maximum compensation allowed by law to the office was six thousand dollars.

Assuming that the theory of the defendant was correct, then his accounts had been improperly adjusted, and there was nothing due to the plaintiffs. On the other hand, if the charge for rent and storage in his customs account was properly made, and the maximum rate of compensation belonging to the office was only three thousand dollars, then he was *justly indebted [* 305] to the plaintiffs for the whole amount of the respective balances, as stated in the transcripts.

After argument, the court instructed the jury, among other

things, that "the act of 3d March, 1841, was the last and controlling law as to the amount of compensation which collectors are allowed annually to retain; and that, under that enactment, the collector of this port was entitled to a compensation of six thousand dollars per annum, provided the same was yielded from the office from commissions for duties and fees for storage, and fees and emoluments, and any other commissions and salaries now allowed and limited by law, or so much from those sources, not exceeding six thousand dollars, as the office yielded."

That instruction affirmed the right of the defendant, under the act of the third of March, 1841, to a compensation of six thousand dollars per annum, or so much thereof, not exceeding that sum, as the office yielded from commissions of every description, fees and emoluments, including rents and storage, and salaries, as allowed and limited by law. Beyond question, it assumed that the tenth section of the act of the seventh of May, 1822, was repealed. Prayers for instruction were then presented by the district attorney, who was counsel for the plaintiffs. He requested the court to instruct the jury to the effect that the provisions of the act of the seventh of May, 1822, respecting the maximum compensation allowed to collectors of the customs, were not repealed by the act of the third of March, 1841, or by any other act, but that the same were in full force; 2. That the only effect the act of the third of March, 1841, had upon the former act, in so far as the same applied to a case like the present, was to create a new and additional source of emolument to such collectors, allowing them to retain not exceeding two thousand dollars for rent and storage of goods, wares, and merchandise, stored in the public stores, and for which a rent was paid beyond the rents paid by such collectors. Each of these prayers was separately presented, and separately refused by the court.

Another prayer for instruction was then presented by the district attorney. It affirmed, in effect, that it was the duty [* 306] *of the defendant, as collector, whenever his emoluments in any one year exceeded three thousand dollars, after deducting the necessary expenses incident to the office, to pay the excess into the treasury, and that the plaintiffs were entitled to recover for all such balances, thus ascertained, as were shown to be due from the evidence. Apply the first and third requested instructions to the facts of the case, and it will be seen that they affirmed the principles adopted by the accounting officers of the treasury, in restating the accounts of the defendant; and if correct, then the whole amount of the respective balances, as stated in the transcript, was due to the plaintiffs.

Taken together, they assume that the tenth section of the act of the 7th of May, 1822, is in full force, and that the defendant had no right, under the act of the 3d of March, 1841, to retain any portion of the amount received for rent and storage. Those prayers for instructions having been refused, the district attorney then prayed the court to instruct the jury as follows:

“That under those acts, it was the duty of the defendant, as collector of the customs, whenever his emoluments exceeded three thousand dollars in any one year, after deducting the necessary expenses incident to his office, to pay the excess, if any, into the treasury, and the plaintiffs are entitled to recover the amount of any such surplus or surpluses, if any, as may be shown by the evidence; but, in ascertaining the amount of the defendant's emoluments as such collector, the jury must exclude all moneys derived by him from fines, penalties, and forfeitures, and also all moneys derived by him from rent and storage of goods, wares, and merchandise, which may have been stored in the public storehouses, and for which a rent was paid beyond the rents paid by him as collector, unless the proceeds of such rents and storage exceed two thousand dollars; in which event, the excess over and above that sum must be taken into account by them, in computing the value of the annual emoluments.”

That prayer was also refused by the court. To understand its precise effect, it is necessary that it should be read in connection with the first and second prayers, which had previously * been presented and refused. When considered together, [* 307] those three prayers disclose the second theory of the plaintiffs, as assumed at the trial.

Like the one assumed in the third prayer, it affirmed that the tenth section of the act of the 7th of May, 1822, was unrepealed, but conceded that the defendant had a right to retain to his own use the moneys received for rent and storage, to an amount not exceeding two thousand dollars. Under the instruction of the court, the jury returned their verdict for the defendant; and the plaintiffs excepted to the charge, and to the several refusals of the court to give the requested instructions. Three questions are presented in the case for decision, which will be briefly and separately considered:

1. Whether the tenth section of the act of the 7th of May, 1822, is repealed by any subsequent act; and if not, then,
2. What is the true construction of the act of the 3d of March, 1841, so far as the same applies to the present case?
3. Whether, by the true construction of the two acts, the defend-

ants had a right to retain to his own use the moneys received from rent and storage, to an amount not exceeding two thousand dollars.

1. It is insisted by the defendant that the maximum prescribed by the tenth section of the act of the 7th of May, 1822, is repealed, and that, under the law regulating his compensation, the legal capacity of the office he held was six thousand dollars, subject to the condition that two thousand dollars only could be received from rent and storage. Six thousand dollars, he maintains, is the maximum under the law of the 3d of March, 1841, applicable to every collector, and that the compensation of each, within that limit, and subject to the before-named condition, is regulated solely by the amount of labor performed.

To show that the tenth section of the act of the 7th of May, 1822, is repealed, his counsel, at the argument, referred to various acts of congress, passed subsequently to the tariff act of the 14th of July, 1832, entitled "An act to alter and amend the several acts imposing duties on imports."

They are as follows : 1833, 4 Stat. 629 ; 1834, 4 Stat. [* 308] 698 ; * 1835, 4 Stat. 771 ; 1836, 5 Stat. 113 ; 1837, 5 Stat. 175 ; 1838, 5 Stat. 264 ; 1840, 6 Stat. 815, private act ; 1841, 5 Stat. 431, sec. 2.

By the first of those acts, usually called additional compensation acts, the secretary of the treasury was authorized, among other things, to pay to the collectors, out of any money in the treasury not otherwise appropriated, such sums as would give those officers respectively the same compensation in that year, according to the importations of the year, as they would have been entitled to receive, if the tariff act of the preceding year had not gone into effect. That provision, with certain additions and modifications, which will presently be noticed, was annually re-enacted to the year 1840, when it was made permanent. For the most part, it was inserted in some one of the annual appropriation acts, and was designed to accomplish the precise object which its language describes, and nothing more.

Compensation to collectors, from the organization of the government to the present time, has been derived chiefly from certain enumerated fees, commissions, and allowances, to which has been added a prescribed sum, called salary, and which is much less than the compensation to which the officer is entitled. Provision for such fees, commissions, and allowances, was first made by the act of the 31st of July, 1789, which also allowed to collectors certain proportions of fines, penalties, and forfeitures. 1 Stat. 64.

More permanent provision, however, was made by the act of the

18th of February, 1793, by the act to regulate the collection of duties on imports and tonnage, passed on the 2d of March, 1799, and by the compensation act passed on the same day. 1 Stat. 316, 627, 786.

By these several acts, certain enumerated fees and commissions are made payable to collectors. They are also entitled to certain proportions of fines, penalties, and forfeitures. Accurate accounts were required to be kept by them of all fees and official emoluments by them received, and of all expenses for rent, fuel, stationery, and clerk hire, which they were required annually to transmit to the comptroller of the treasury; * but they were allowed to retain to their own use the whole amount of emolument derived from that source, without any limitation. Maximum rate of compensation was first prescribed by the act of the 13th of April, 1802. That limit was five thousand dollars, and it was applicable to all collectors. [* 309]

By that act, it was provided, that whenever the annual emoluments of any collector, after deducting the expenses incident to the office, amounted to more than five thousand dollars, the surplus should be accounted for and paid into the treasury. 2 Stat. 172.

Further regulations, as to fees, commissions, other emoluments, and salaries, were made by the act of the 7th of May, 1822, as therein prescribed.

One of those regulations was, that whenever the emoluments of any collector, for seven enumerated ports, after deducting the necessary expenses incident to the office, should exceed four thousand dollars, the excess should be paid into the treasury, for the use of the United States. By the tenth section, it was also provided, that whenever the emoluments of any other collector of the customs should exceed three thousand dollars, after deducting such expenses, the excess should be paid into the treasury, for the same purpose. They were also required to account to the treasury for all emoluments and for all expenses incident to their offices, and those accounts were to be rendered upon oath. Neither of the two last-mentioned acts extended to fines, penalties, and forfeitures. 3 Stat. 695. Under that act, three thousand dollars was the maximum which could be allowed to the office held by the defendant; and it is conceded by his counsel that it remained in full force to the time when the additional compensation acts before mentioned were passed. Large additions had been made to the free list by the tariff act of the 14th of July, 1832, and the rate of duties on imports so far reduced that the sources of emolument to collectors would not yield sufficient to give them an adequate compensation.

To supply that deficiency, those additional compensation acts were passed. Much reliance is placed by the counsel of the defendant upon * the last proviso, which appears in nearly the same form in several of the acts. Take, for example, the one in the act of the 7th of July, 1838, which is the act that was subsequently made permanent. It provides that no collector shall receive more than four thousand dollars. That sum is the maximum rate of compensation allowed to collectors of the enumerated ports in the act of the 7th of May, 1822; and inasmuch as the limit of three thousand dollars, therein prescribed as applicable to the non-enumerated ports, was not reproduced in the new provision, it is insisted it was repealed, so that every collector, whether of the enumerated or non-enumerated ports, may now claim to receive an annual compensation of six thousand dollars from the sources of emolument recognized by that act, provided his office yields that amount, after deducting the necessary expenses incident to the office. To that proposition we cannot assent. On the contrary, when we look at the language of the new provision, in connection with that of the prior law, and consider the mischief that existed, the remedy provided, and the true reason of the remedy, we are necessarily led to a different conclusion. Commercial ports, where the revenue is collected, were divided by the prior law, so far as respects the compensation of collectors, into two classes, enumerated and non-enumerated. Collectors of the seven enumerated ports might receive an annual compensation of four thousand dollars, provided their respective offices produced that amount, after deducting the necessary expenses incident to the offices, from all the sources of emolument recognized and prescribed by the existing laws.

On the same principles, and subject to the same conditions, the collectors of the non-enumerated ports might receive an annual compensation of three thousand dollars. No one could receive more than that sum, and his lawful claim might be much less.

Ten years' experience under that law, prior to the passage of the tariff act of the 14th of July, 1832, had witnessed but few complaints respecting the classification of the ports, or the standard of compensation to collectors of customs, and had called for [* 311] no important alteration in the laws upon that * subject.

Throughout that period, the rates of duties on imports were high, and nearly every article of consumption imported from other countries was taxed. Change of policy in that behalf, as carried out in the legislation of the succeeding year, affected the emoluments of collectors, and reduced the amount of net income

from the sources of their emolument below the standard of a reasonable compensation. To remedy that mischief, and restore their compensation to what it would have been if no change had taken place, was the purpose for which those additional compensation acts were passed. They had the effect to change the basis of computation, so as to augment the estimated net income from the authorized sources of emolument to what it would have been if the tariff act had not passed; but they were not intended to make any change, either in the sources from which the emoluments were derived, or the maximum rate of compensation. Mention was made of the largest maximum prescribed in the prior law, not with any view to repeal or modify the other, which was applicable to the non-enumerated ports, but to exclude the conclusion that it was the intention of the provision to increase the compensation of the collectors of the principal ports beyond what it would have been if the free list had not been augmented, and there had been no diminution in the rates of duties on imports.

Suppose there was nothing in the language of the act to qualify the provision, and nothing in the history of the legislation upon the subject to aid in the exposition; still we would not think it so clearly inconsistent with the prior law as to operate as a repeal. Repeal by implication, upon the ground that the subsequent provision upon the same subject is repugnant to the prior law, is not favored in any case; but where such repeal would operate to reopen accounts at the treasury department long since settled and closed, the supposed repugnancy ought to be clear and controlling before it can be held to have that effect. Such was the doctrine substantially laid down by this court in *Wood v. United States*, 16 Pet. 363; and we have no hesitation in reaffirming it as applicable to the present case. *Aldridge et al. v. Williams*, 3 How. 23; *U. S. v. Packages of Dry Goods*, 17 How. p. 93; 2 [*312] *Dwarris on Stat.* 533.

All of these additional compensation acts are *in pari materia* with the several acts prescribing the sources of emolument, and the whole must be construed together. When they are so considered, there is no such repugnancy as is supposed by the defendant. Collectors, as before, were still required to render an account; and the new provision expressly provides that no officer shall receive under that law a greater annual salary or compensation than was paid to him for the year the before-mentioned tariff act was passed.

2. Having disposed of the proposition chiefly relied on by the defendant, we come now to consider the second question presented for decision. That question cannot be understood without referring

to the previous legislation upon the subject, and the practice that had grown up under it. Importers were allowed by the act of the fourteenth of July, 1832, to place certain goods in the public stores, under bond, at their own risk, without paying the duties. Duties on goods so stored were required to be paid one half in three months, and the other half in six months; but while the goods remained in the public stores, they were subject to customary storage and charges, and to the payment of interest at the rate of six per cent. Goods thus deposited might be withdrawn at any time in whole or in part by paying the duties on what were so recalled, together with customary storage and charges and the interest. Public stores were accordingly rented; and as the business increased, the storage received by the collector from the importers exceeded the amount paid to the owner of the stores, and there was no law requiring collectors to account for the excess, which was retained by the collectors to their own use, and went to swell the amount of their compensation.

To correct that supposed abuse, the act of the third of March, 1841, was passed. By that act, every collector was required to render a quarter-yearly account in addition to the account previously directed by law. That additional account, as prescribed in the act, was to include all sums collected or received from [* 313] fines, penalties, or forfeitures, or for seizure of *goods, wares, and merchandise, or upon compromises made upon seizures, or on account of suits instituted for frauds against the revenue, or for rent and storage of goods, wares, and merchandise, which were stored in the public stores, and for which a rent was paid beyond the rents paid by the collector. As originally framed, the provision required the collector, in case the sums received by him from all those sources exceeded two thousand dollars, to pay the excess into the treasury as part and parcel of the public money. After it was introduced, however, it was so amended and changed in its passage, that while it still directs the account to be rendered, it requires no part of the money derived from those sources to be paid into the treasury, except what is received for rent and storage as aforesaid, and for "fees and emoluments." Every collector was required to account for fees and emoluments by previous laws; and as the account to be rendered under this act is expressly declared to be one "in addition to the account now required," there is nothing left for that part of the section directing the payment of the excess into the treasury to operate upon, except the sums received for rent and storage.

By the true construction of the act, therefore, every collector is

required to include in his quarter-yearly account, as directed in the first part of the section, all sums received by him for rent and storage of goods, wares, and merchandise, stored in the public stores, for which rent is paid beyond the rents paid by him as collector; and if, from such accounting, the aggregate sums received from that source exceed two thousand dollars, he is directed and required to pay the excess into the treasury, as part and parcel of the public money. When the sums so received from that source in any year do not in the aggregate exceed two thousand dollars, he may retain the whole to his own use; and in no case is he obliged to pay into the treasury anything but the excess beyond the two thousand dollars.

It is insisted, in one of the printed arguments filed in this case, that the act now under consideration has the effect to repeal the maximum prescribed in the prior act, and that every collector, under this act, is entitled to six thousand dollars as *an [* 314] annual compensation, provided the office yields that sum from all the sources of emolument, including rent and storage. Collectors of the enumerated ports undoubtedly may receive four thousand dollars from the sources of emolument recognized in the act of the seventh of May, 1822, and they may also receive two thousand dollars from rents and storage. Those two sums are equal to the new maximum rate created by the act under consideration, which provides that no collector, under any pretense whatever, shall receive, hold, or retain, more than six thousand dollars per year, including all commissions for duties and all fees for storage, or fees, or emoluments, or any other commissions or salaries which are now allowed and directed by law. But it is quite clear that there is nothing in the act having the slightest tendency to show that the prior act is repealed, so far as it is applicable to the collectors of the non-enumerated ports. No new maximum is fixed to their compensation, and there is not a word in the new provision inconsistent with the tenth section of the prior act.

To suppose that the new maximum applies to the collectors of the non-enumerated ports, would be to impute an absurdity to the act, for the reason, that under no possible state of things can such collectors lawfully retain, hold, or receive, more than five thousand dollars as their annual salary or compensation, from all the sources of emolument recognized and prescribed by the two acts. It may be five thousand dollars, or it may be much less than three thousand dollars, according to the state of the importations and the amount received from rent and storage.

3. It only remains to apply the principles already ascertained,

The United States v. West's Heirs.

in order to determine the third question presented for decision. Collectors of the non-enumerated ports may receive, as an annual compensation for their services, the sum of three thousand dollars from the sources of emolument recognized and prescribed by the act of the seventh of May, 1822, provided their respective offices yield that amount from those sources, after deducting the necessary expenses incident to the office, and not otherwise; and in addition thereto, they are also entitled to whatever sum [* 315] or sums they may receive for rent and * storage, provided the amount does not exceed two thousand dollars; but the excess beyond that sum they are expressly required to pay into the treasury, as part and parcel of the public money.

Charges against the defendant for rent and storage must be settled in accordance with these principles. It follows, that the instruction given by the presiding justice was erroneous; and we also think that the first, second, and fourth prayers for instruction ought to have been given to the jury.

Suits were also instituted against the sureties of the defendant. Judgment was entered in the court below for the respective defendants in those suits, and the causes were removed into this court by writs of error, sued out by the plaintiffs. Those causes were submitted at the same time with the one just decided. They depend upon the same principles, and must be disposed of in the same way.

The judgment of the circuit court is therefore reversed in each of the three cases, and the respective cases are remanded, with directions to issue new venire.

UNITED STATES, Appellants, v. THE HEIRS OF MARCUS WEST.

22 H. 315.

CALIFORNIA LAND GRANTS—FRAUDULENT ALTERATION OF ORIGINAL DOCUMENTS.

1. When Jimeno's Index and other archives of the Mexican government show a grant, and the extent of it, subsequent alterations in the original papers, with intent to enlarge the quantity, will not necessarily defeat the grant for the quantity actually conceded.
2. Though Jimeno's Index is not authoritative evidence of grants included in it, nor against those not found there, it is evidence, in this instance, of his own action, as he was governor *ad interim* when West's concession was made.

APPEAL from the district court for the northern district of California. The case is stated in the opinion.

Mr. Stanton, and *Mr. Black*, attorney general, for the United States.

Mr. Benham, for appellees.

* Mr. Justice WAYNE delivered the opinion of the court. [* 317]

All of the documents upon which the defendants rely for a confirmation of their right to the land in dispute, are to be found on file in the archives among the expedientes of the first class. Concerning the genuineness of those which show that a grant for a league and a half was originally made to Marcus West, there can be no denial. They were admitted by the attorney general to be genuine; but he resists the confirmation of that title, upon the ground that fraudulent attempts were subsequently made to enlarge the quantity intended to be granted, by erasures and interlineations.

West first petitioned for the land, without stating the quantity. In a few days afterwards, General Vallejo certified that the land asked for was vacant, and that it was not within twenty leagues of the boundary of California, nor within ten leagues of the sea shore. On the 30th of October, 1840, a report was made to the governor, that the petitioner had the qualifications for receiving a grant, and that the land might be granted.

Jimeno was then acting as governor *ad interim*. He declared West to be entitled to the land, to the extent of a league and a half, describing particularly its boundaries; and he made an entry of his executive action in the case, in what is termed Jimeno's Index.

We do not regard that catalogue of grants as authoritative proof of grants enumerated in it, or as a conclusive exclusion of grants not so registered by Jimeno, which may be alleged to have been made whilst California was a part of the Mexican Republic, though they may bear date within the time to which that index relates.

But in this case, it may be referred to as an auxiliary memorandum made by Jimeno himself of his action upon the petition of West.

* West died before the claim was acted upon by the [* 318] United States commissioners.

We have only to observe, that the fraudulent attempts to enlarge the grant were made after California had been ceded to the United States; and though the proof of it is undeniable, and was an attempt to defraud the United States, that cannot take away from

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the wife and children of West their claim to the grant, which was made to him before California had been transferred by treaty.

We affirm the decree of the court below, confirming the grant to West for a league and a half

LOUIS L. REFELD and others, Appellants, v. WILLIAM W. WOODFOLK.

22 H. 318.

EQUITY—COVENANTS AGAINST INCUMBRANCES.

1. Where a contract for the sale of land, with an agreement to convey by deed of general warranty, has been executed by the delivery of possession and payment of the purchase money, the purchaser cannot, in the absence of fraud and concealment, refuse to receive a deed with proper covenants, or go into chancery to obtain indemnity against incumbrances.
2. Especially is this so where the incumbrance is such that it is uncertain whether anything will ever become payable or due on it, or, if so, what amount.
3. In such case, where the vendee has received possession, and parted with his purchase money, he must rely on the covenants of title which he agreed to receive.

APPEAL from the circuit court for the district of Arkansas. The case is very well stated in the opinion.

Mr. Pike, for appellants.

Mr. Meigs, for appellee.

[* 325] * Mr. Justice CAMPBELL delivered the opinion of the court.

The appellee (Woodfolk) filed this bill in the circuit court against the executors and heirs of Frederick Notrebe, deceased, and the trustees of the Real Estate Bank of Arkansas.

He represents that, in 1845, he concluded an agreement with Notrebe for the purchase of fourteen hundred and seventy-eight acres of unimproved land in Arkansas, for fifteen thousand five hundred and eighteen dollars, a portion payable in cash, and the remainder in installments, secured by his notes and bond. Notrebe and his wife obligated themselves, when the payment should be completed, to convey to him the land in fee simple, "by a good and sufficient deed, with general warranty of title, duly executed, according to law."

The appellee has established a plantation upon the land, and has greatly improved its value. He completed the payment in 1850, when the executor of Notrebe offered a deed executed by his widow and heir-at-law, in which there was a covenant of warranty, in fulfillment of the agreement of his testator. The appellee declined to

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accept this, because the land had been mortgaged to the Real Estate Bank of Arkansas, in 1837, by Notrebe, to secure the payment of his note for thirty thousand dollars, payable in October, 1861, with five per cent. interest annually, which Notrebe had given for three hundred shares of the stock of that bank. The appellee charges that the existence of this mortgage was concealed from him until after the conclusion of his agreement, and that afterwards he was deceived by misrepresentations of the condition of the title, until he had paid the whole of the purchase money. He prays that the title be examined, and that the defendants be required to remove the encumbrance, or to give him effectual indemnity against it, and that the distribution of the estate of Notrebe be restrained until this be done.

The defendants answered the bill, and have successfully repelled the imputations of fraud and misrepresentation, but admit the existence of the mortgage, and fail to impair its validity.

The circuit court, upon the pleadings and proofs, declare *that the "entire transaction" between Notrebe [*326] and the appellee "was *bona fide* and free from fraud," and that the latter had notice of the mortgage as a subsisting and operative encumbrance upon the land before he concluded his contract; but that Notrebe had agreed to convey the land free of encumbrance and with warranty of title, and that the vendee is entitled to the performance of that contract; but that the debt of the decedent, not being at maturity, and of a character not to be ascertained before that time, all that could be done would be to provide an indemnity against the peril it created.

The court proceeded to require of the executors to remove the encumbrance whenever it can be done, and then to convey the land by a deed with warranty, and with the relinquishment of dower by the widow; and, meanwhile, that they should deposit with the clerk of the court bonds of the State of Arkansas, for the amount of Notrebe's note and the interest, (\$61,500,) to be held and appropriated under the order of the court as indemnity, or that the executors might, in part or for the whole, convey to the clerk unencumbered real estate of the same value, for the same object and under the same conditions.

The Real Estate Bank was established on a loan by the State of Arkansas of its bonds, which the bank sold to form *its* capital. The principal and interest of these bonds were to be paid by the bank; and its means of doing so were afforded by the securities obtained from the loan of its capital and profits of business, and the bonds and mortgages of the stockholders, to the extent of their

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subscription of stock. Each stockholder having given a bond and mortgage to the bank corresponding to the *pro rata* amount of the State bonds issued to the bank, as compared with the stock, and which were pledged for the payment of the State bonds, the sum to be paid by any shareholder on this debt depends upon the degree of the insolvency of the bank. In case of the loss of its entire capital, the stockholder becomes liable to pay his entire debt.

The pleadings and proofs in this case show that the bank has suffered a loss of a portion of its capital, but no data are afforded to ascertain the amount of the loss. The decree of [* 327] * the circuit court assumes that the loss may be total; and the indemnity awarded was determined as if the fact would correspond with the possibility. This appeal was made to test the validity of this decree.

A court of chancery regards the transfer of real property in a contract of sale and the payment of the price as correlative obligations. The one is the consideration of the other; and the one failing, leaves the other without a cause. In *Ogilvie v. Foljambe*, 3 Mer. 53, Sir William Grant says: "The right to a good title is a right not growing out of the agreement of the parties, but which is given by law. The purchaser insists on having a good title, not because it is stipulated for by agreement, but on the general right of a purchaser to require it."

Upon this principle, a vendor is allowed a lien or privilege for the price of the property against the vendee and his assigns; and the vendee is permitted to appropriate the purchase money, to exonerate his estate from a lien or encumbrance, and in some cases to compensate for original defects in the estate, as respect its quantity, quality, or extent of vendor's interest therein.

The cases cited on the part of the appellee support this doctrine, and confirm the argument that he was entitled, under his contract, (having no reference to extrinsic circumstances,) to the fee simple estate, without diminution. *Galloway v. Findley*, 12 Pet. 264; *Burwell v. Jackson*, 5 Seld, 535; *Cullum v. Bank of Ala.* 4 Ala. R. 21.

But such circumstances may very materially modify the situation of the parties, and indispose that court to interfere between them, even in cases within the jurisdiction of the court. If the contract has been executed by the delivery of possession and the payment of the price, the grounds of interference are limited by the covenants of the deed, or to cases of fraud and misrepresentation. "The cases will show," say this court, "that a purchaser in the undisturbed possession of the land will not be relieved against the pay-

ment of the purchase money on the mere ground of defect of title; there being no fraud or misrepresentation; and that in such a case he must *seek his remedy at law, on the covenants [* 328] in his deed; that if there is no fraud and no covenants to secure the title, he is without remedy, as the vendor, selling in good faith, is not responsible for the goodness of his title beyond the extent of the covenants in his deed. *Patton v. Taylor*, 7 How. 132.

This rule, experience has shown, reconciles the claims of convenience with the duties of good faith. The purchaser is stimulated to employ vigilance and care in reference to the things as to which they will secure him from injustice, while it affords no shelter for bad faith on either part.

The intermediate cases—those in which the parties have advanced in the completion of their contract, and are still willing to abide by it, and there arises a real inability or a well-founded apprehension of danger, in that stage of their proceedings, to the completion of the contract—have created much embarrassment. Some of these cases have been settled upon terms of compensation, in which the court of chancery has exercised a doubtful jurisdiction, in modifying the conditions of the contract according to the supervening circumstances. *White v. Cudden*, 8 Cl. and Fin. 766; *Thomas v. Dering*, 1 Keen, 729; *Dart, Vend. and P.* 499, *et seq.*

We have met with no case in which a vendee, in possession under a contract of purchase or a deed with covenants, has been permitted to reclaim the purchase money already paid, to be held as a security for the completion or protection of his title. The Roman law permitted the vendee to retain the purchase money in his hands, as security against an impending danger to the title; but denied a suit for restitution, after payment for that cause. "We must not," says Troplong, "hastily break up a contract which the vendor may at last be able to fulfill. There is no analogy between the case in which the purchaser is allowed to retain the price as security, and that in which he would force the vendee to restore it for that purpose. Between the right of retention and that of restitution of the price, there is the distance between the *statu quo* and rescission." *Trop. de Vente*, No. 614; *Dalloz Juris. gen. tit. de Vente*, sec. 1170.

The decree of the circuit court does not direct the restitution *of the purchase money to the vendee, nor its [* 329] application by the vendor to assure the attainment of the object of the contract; but it sequesters property of the vendor of four times the amount, to be held or disposed of by the court in its discretion, to assure the accomplishment of that object. In the

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case of *Milligan v. Cooke*, 16 Vesey, 1-14, Lord Eldon made an order that the purchaser should be compensated for the difference in the value between the title contracted for and that exhibited; and if that difference could not be ascertained, the master was directed to settle the security to be given by the defendant as indemnity to the purchaser against disturbance or eviction; and a similar order was made in *Walker v. Barnes*, 3 Mad. 247. But there were conditions in the contract that authorized the order.

In *Balmorno v. Lumley*, 1 V. and B. 224, and *Paton v. Brebner*, 1 Bligh. P. C. 42, the cases in which such a relief could be granted appear to be limited to that class. In the latter case Lord Eldon said: "This suit is in substance or effect (allowing for dissimilarities between English and Scotch proceedings) in the nature of a suit in a court of equity in England for the specific performance of a contract. In such a suit, if it turns out that the defendant cannot make a title to that which he has agreed to convey, the court will not compel him to convey less, with indemnity against the risk of eviction. The purchaser is left to seek his remedy at law, in damages for the breach of the agreement."

In *Aylett v. Ashton*, 1 M. and C. 309, the master of the rolls, upon the authority of the cases cited, said: "Parties no doubt may contract for a covenant of indemnity; but if they do not, the court cannot compel a party to execute a conveyance and to give an indemnity." To the same effect is *Ridgway v. Gray*, 1 Mac. and G. 109.

The appellee does not seek to rescind this contract; nor does he disclose any imminent peril of disturbance or eviction, as the effect of the existence of the mortgage. The record shows that the widow and heir of Notrebe, whose covenant of warranty has been offered to the appellee, are either of them able to respond to the [* 330] damages that would be awarded upon * the breach of that covenant. The appellee had notice of this encumbrance when he made and performed his agreement of purchase, and did not stipulate for any additional indemnity to that resulting from the covenant of warranty. We must therefore conclude that he was willing to abide the settlement of the affairs of the Real Estate Bank, and to rely upon the protection afforded by the covenants in his deed. We have no reason to suppose that the vendor would have consented to deposit in the hands of a stranger four times the value of the property he sold, as a security for the fulfillment of his contract; nor can we superadd this to the other obligations he has assumed.

Our opinion is, that the decree of the district court is erroneous, and must be reversed.

Ward v. Thompson.

The deeds tendered seem to be in conformity with the stipulation of the vendor in the agreement. The vendee may elect to take these, or he may retain the agreement. In either case, his bill will be dismissed with costs; and for this purpose the cause is remanded.

EBER B. WARD, Appellant, v. CHARLES THOMPSON.

22 H. 330.

ADMIRALTY JURISDICTION.

The district court of the United States sitting in admiralty has no jurisdiction of a contract of partnership for the use of a vessel put into a line for carrying passengers and freight. The contract arranged the contributions which each party was to make, and the share of profits to be received; and though one of the parties furnished the vessel, the contract was not a charter party.

APPEAL from the circuit court of the United States for the district of Michigan. The suit was brought by a libel in the district court on what was called a charter-party. That court dismissed the bill for want of jurisdiction in admiralty. The circuit court affirmed that decree. The case is otherwise stated in the opinion.

Mr. Newberry, for appellant.

Mr. Hand and *Mr. Lothrop*, for appellee.

* Mr. Justice GRIER delivered the opinion of the court. [* 332]

The articles of agreement containing the contract, which is the subject matter of this suit, are denominated in the libel a charter-party of the steamboat *Detroit* to respondent. The answer denies that he had chartered the vessel, and alleges that the writing declared on is a contract of partnership, and * not a charter-party. The circuit court agreed with the [* 333] respondent as to the construction of the contract, and consequently dismissed the bill.

A court of admiralty takes cognizance of certain questions between part owners, as to the possession and employment of the ship, but will not assume jurisdiction in matters of account between them. (*Orleans v. Phœbus*, 11 Peters, 175.) It is not disputed that a contract of partnership in the earnings of a ship comes within the same category. If the party desires an account, his remedy is in a court of chancery. If his complaint be for a breach of some independent covenant, he should seek his remedy in a court of common law.

Berthold v. McDonald.

A charter-party is defined to be "a contract by which a ship, or some principal part thereof, is let to a merchant, for the conveyance of goods on a determined voyage to one or more places."

A contract of partnership is where parties join together their money, goods, labor, or skill, for the purposes of trade or gain, and where there is a community of profits.

The only characteristics of a charter-party to be found in this contract are, that the subject of it is a ship, and that libelants are owners. There is no letting or hiring of the ship, to the respondent for a given voyage, to be employed by him for his own profit. On the contrary, the Wards contributed a steamboat, to be put into a line for freight and passengers, which has also a contract for carrying the mail. Thompson contributes the good will of an established line, together with his care, skill, and experience. He is to have the general management of the business, and the selection of the officers and crew; but the clerk, or receiving and disbursing agent, is to be appointed by the Wards, and to be under their control.

The receipts of the steamer are to be applied—

1st. To pay expenses.

2d. Insurance.

3d. Six thousand dollars to Ward.

4th. Three hundred to Thompson.

5th. The balance of the profits to be equally divided.

[* 334] * Here we have everything necessary to constitute a partnership:

1st. The parties have *joined* together to carry on a certain adventure or trade, for their mutual profit—one contributing the vessel, the other his skill, labor, and experience, &c.

2d. There is a communion of profits, on a fixed ratio.

Of such a contract, a court of admiralty has no jurisdiction.

The decree of the circuit court is therefore affirmed, with costs.

PIERRE A. BERTHOLD and others, Plaintiffs in Error, v. JAMES McDONALD and MARY McREE.

22 H. 334.

JURISDICTION OVER SUPREME COURT OF STATE—MISSOURI LAND TITLES.

1. A judgment of the supreme court of Missouri, which held invalid a title confirmed by the board of commissioners under the acts of congress to adjust claims under Spanish grants, may be reviewed in this court.
2. Where the same land was confirmed to two different persons, neither of whom has

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received a patent, the State court, in an action for possession, may rightfully inquire into the equities prior to the order of confirmation.

3. Where that court held that the prior confirmation was void as against the second, because the deed on which it was founded was a fraud and forgery never recognized by the person actually owning the right, this court affirms that judgment.

THIS was a writ of error to the supreme court of Missouri. The case is fully stated in the opinion.

Mr. Washburne, for plaintiffs in error.

Mr. Blair and *Mr. Gamble*, for defendants.

* Mr. Justice CATRON delivered the opinion of the court [* 338]

The board of commissioners, sitting at St. Louis to examine claims to lands, according to the act of March 3d, 1807, confirmed to Charles Gratoit, assignee of Jeannette Flore, two arpens in front, by forty back, lying in the Prairie des Noyers, near to St. Louis. This common-field lot had been designated by survey, and was well known. The confirmation was made November 19th, 1811.

On the next day, (November 20th, 1811,) the board also confirmed the same land to Jeannette, a free negro woman. Patent certificates issued to Gratoit and Jeannette, respectively, dated the same day, 20th November, 1811. Jeannette died about 1803, leaving as her heir a child named Susan Jeannette, who died about 1840.

Gratoit got a deed for the land from a different person, named Florence Flore, who conveyed in the name of *Jeannette Flore*. This deed was made in 1805, and filed by Gratoit with the recorder, and on which deed his confirmation by the board was founded. Jeannette had occupied the land for many years before her death. Florence Flore had never occupied it; had no claim to it, at any time, and conveyed in ignorance of what land her deed covered, in all probability. Gratoit died in 1817, leaving a widow and children. Neither he nor his heirs pretended to have any claim to the premises until recently, before this suit was brought by the heirs.

McDonald and Mary McRee, the defendants, claim under Jeannette, who got the second confirmation. This suit was instituted in the land court at St. Louis by petition, in 1854, under the new code of procedure of Missouri, which confounds all distinction between law and equity, and combines both remedies in the same action. The petition was answered, and a trial had on the merits, before the court and a jury.

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The court, on motion of the defendants, instructed the jury as follows:

"If the jury find, from the evidence, that the tract of land confirmed to Jeannette by the board of commissioners includes the land in controversy, and is the same land which was surveyed for Jeannette by the authority of the Spanish government; [* 339] * that said Jeannette, and those acting for or under her, were the only persons who inhabited, cultivated, or possessed, the said tract, prior to the 20th of December, 1803; that the person who executed the deed in the name of Jeannette Flore, and filed by Charles Gratoit with the recorder of land titles as one of the evidences of his claim, *is not the person* for whom the survey of said tract of land was so made, but another and a different person, and that she cultivated and possessed, prior to the 20th of December, 1803, another and different tract in the same common field, surveyed for her, by authority of the Spanish government, in the year 1788, embracing no part of the land in controversy, the jury ought to find for the defendants."

This instruction was excepted to, and a verdict was found for the defendants.

The cause was brought to the supreme court of Missouri by writ of error, where the judgment of the land court was affirmed; and to revise this judgment, a writ of error was prosecuted out of this court, under the 25th section of the judiciary act.

As the *title* of Gratiot's heirs was directly drawn in question by the foregoing instruction, and as the decision below, giving the instruction, rejected the title, no doubt can exist in regard to the authority of this court to re-examine the decision of the State courts.

It was so determined, in the case of *Lytle et al.* against the State of Arkansas and others, decided here at this term.

The titles in controversy are equities only, no patent having issued to either claimant on the certificates granted by the board. (10 How. 374.) With these equities, the courts of Missouri were dealing on parol evidence, reaching behind the confirmation; and the question is, had they the power to do so?

The rule laid down by this court in the case of *Garland v. Wynn* (20 How. 8) is, "that where several parties set up conflicting claims to property, with which a special tribunal may deal as between one party and the government, regardless of the rights of [* 340] others, the latter may come into the ordinary * courts of justice, and litigate the conflicting claims." The board of commissioners was a special tribunal, within the rule.

The principle was applied in the case of Lytle and others against the State of Arkansas and others, cited above.

In these cases, and in several others, the contest was between claimants under occupant laws, giving a preference of entry to actual settlers; and where an applicant obtained the preference, and was allowed to enter the land on producing false affidavits, by which he imposed on the register and receiver, to the prejudice of another's right.

In the instance before us, each of the parties claimed as occupants for ten consecutive years before the 20th of December, 1803. Gratiot and Jeannette both proved that the latter had occupied as required, but Gratiot imposed on the board by his false deed of assignment for the lot obtained by him from Florence Flore, whose name was untruly signed *Jeannette Flore*; and by reason of this imposition, he obtained confirmation and a patent certificate, which his heirs make the foundation of their suit.

Each party here has a good title, as against the United States, the act of 1807 declaring that a confirmation of the board shall be conclusive against the government.

As both claims were filed in proper time, and the confirmations were had in due time, the equities are equal, and balance each other, so far as they depend on the confirmations alone; and the question is, can the ordinary courts of justice go behind the right established by the record confirming Gratiot's claim? To do this, proof must be heard impeaching his *prima facie* title, and which proof existed when the claim was filed with the recorder and acted on by the board. In other words, could the State courts go behind Gratiot's confirmation, and, on evidence, compare his equity with that of Jeannette, and adjudge who the true owner was?

In the case of *Doe v. Eslava*, (9 How. 421,) this court came to the conclusion, (although it is not distinctly expressed,) that in a contention between double concessions, which balanced each other, proof could be heard, and must of necessity *be [* 341] heard, to determine the better right between the contending parties.

In the cases of *Chouteau v. Eckhart* and *Le Bois v. Brammell*, it was held that the grant made by the act of 1812, of the village commons of St. Charles and St. Louis, and of village lots, to possessors, gave a title in fee; and that a claimant, under a Spanish concession subsequently confirmed, could not go behind the act of congress, and overthrow the legal title it conferred; and this, for the plain reason that neither Chouteau nor Le Bois had any title, when the act of 1812 was passed, that could be asserted in a court

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of justice; and as the political power from which alone they could take title had cut them off, to that power they must look for redress of the injury, if any existed.

To conflicts of title of the foregoing description, the principles asserted in the case of *Landes v. Brant* (10 How. 370) apply.

We have no doubt of the correctness of the decision of the supreme court of Missouri in this cause, and order its judgment to be affirmed.

ALEXANDER REY and others, Plaintiffs in Error, v. JAMES W. SIMPSON.

22 H. 341.

NEGOTIABLE NOTES—ENDORSEER.

1. Where a promissory note, made payable to a particular person or order, is first endorsed by a third party, such third person is held to be an original promisor, guarantor, or endorser, according to the nature of the transaction or understanding of the parties at the time it took place.
2. Where such third person put his name on the paper, as surety for the maker, before it was delivered to the payee, he must be held to be an original promisor.
3. Parol proof of the circumstances under which the endorsement was made is admissible to show the nature of the transaction.

WRIT of error to the supreme court of the territory of Minnesota. The case is fully stated in the opinion.

Mr. Stevens and *Mr. Brisbin*, for plaintiffs in error.

Mr. Bradley, for defendant.

[* 346] *Mr. Justice CLIFFORD delivered the opinion of the court.

This is a writ of error to the supreme court of the territory of Minnesota.

According to the transcript, the suit was commenced by James W. Simpson, the present defendant, on the twenty-first day of December, 1855, in the district court of the territory, for the second judicial district, against the plaintiffs in error, who were the original defendants. It was an action of assumpsit, and was brought upon a certain promissory note for the sum of three thousand five hundred and seventeen dollars and seven and a half cents, bearing date at St. Paul, in that territory, on the fourteenth day of June, 1855, and was made payable to the order of the plaintiff six months after date, for value received. At the period of the date of the

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note, as well as at the time the suit was instituted, two of the defendants, * William R. Marshall and Joseph M. [* 347] Marshall, were partners, doing business under the style and firm of Marshall & Company.

As appears by the declaration, the note was made and signed by the defendant first named in the original suit, at the time and place it bears date.

And the plaintiff further alleges in the declaration, that, after making and signing the note, the same defendant then and there delivered the note to the other two defendants; and that they then and there, by their partnership name, endorsed the same, by writing the name of their firm on the back of the note, and then and there redelivered the same to the first-named defendant, who afterwards, and before the maturity of the note, delivered it so endorsed to the plaintiff. He also alleges that the defendants, William R. Marshall and Joseph M. Marshall, so endorsed the note for the purpose of guarantying the payment of the same, and of becoming sureties and security to him, as the payee thereof, for the amount therein specified; and that he, relying upon their endorsement, took the note, and paid the full consideration thereof to the first-named defendant.

Other matters, such as due presentment, non-payment, and protest, are also alleged in the declaration, which it is unnecessary to notice at the present time, as the questions to be determined arise out of the allegations previously mentioned and described.

Personal service was made on each of the defendants, but the one first named did not appear; and after certain interlocutory proceedings, conforming to the laws of the territory and the practice of the court, he was defaulted.

On the thirty-first day of December, 1855, the counsel of the other two defendants served notice of a motion to strike out all that part of the declaration which sets forth the purpose for which it is alleged they endorsed the note, and so much of the declaration, also, as alleges that the plaintiff took the note as payee, relying upon the endorsement, and paid to the first-named defendant the full consideration thereof, as before stated. That motion was subsequently heard before *the court; and on [* 348] the ninth day of February, 1856, was denied and wholly overruled. After the motion was overruled, the defendants, whose firm name is on the back of the note, demurred specially to the declaration.

None of the causes of demurrer need be stated, as they will be sufficiently brought to view in considering the several propositions

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assumed by the counsel on the one side and the other, in the argument at the bar. Suffice it to say, that the demurrer was overruled; and on the tenth day of July, 1856, judgment was entered for the plaintiff against all of the defendants for the amount of the note, with interest and costs.

On the eighteenth day of September, 1856, the defendants sued out a writ of error, and removed the cause into the supreme court of the territory, where the judgment of the district court was in all things affirmed; and on the fourth day of February, 1857, a final judgment was entered for the plaintiff, that he recover the amount of the judgment rendered in the district court, with interest, costs, and ten per cent. damages, amounting in the whole to the sum of four thousand three hundred seventy-one dollars and ninety-seven cents. Whereupon the defendants sued out a writ of error to this court, which was properly docketed at the December term, 1857.

All civil suits in the courts of Minnesota are commenced by complaint; and suitors are enjoined by law in framing their declarations, to give a statement of the facts constituting the cause of action; which statement is required to be expressed in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.

Pursuant to that requirement, and the practice of the courts of the territory at the time the suit was commenced, the plaintiff in this case set forth the facts already recited as contained in the complaint or declaration.

Facts thus stated in the declaration, pursuant to the directions of the law of the territory, and which were material to the understanding of the rights of the parties to the controversy, [* 349] could not properly be suppressed by the court. * Irrespective, therefore, of the question whether or not the motion of the defendants to strike out that part of the declaration was waived, because not pressed in the supreme court of the territory, no doubt is entertained by this court that the motion was properly overruled by the district court upon the merits.

Proof of the attending circumstances under which the defendants, William R. Marshall and Joseph M. Marshall, had placed their firm name upon the back of the note, would clearly have been admissible in a trial upon the general issue; and if so, no reason is perceived why it was not proper for the plaintiff, under the peculiar system of pleading which prevailed in the courts of the territory at the time the suit was commenced, to state those circumstances in the declaration. Beyond question, they were a

part of the facts constituting the cause of action; and if so, they were expressly required to be stated by the law of the territory prescribing the rules of pleading in civil cases. And having been alleged in pursuance to such a requirement, and being material to a proper understanding of the rights of the parties to the suit, it must be considered, by analogy to the rules of pleading at common law, that they are admitted by the demurrer.

By the admitted facts, then, it appears the defendants, William R. Marshall and Joseph M. Marshall, placed their firm name on the back of the note at its inception, and before it had been passed or offered to the plaintiff. They placed their firm name there at the request of the other defendant, knowing that the note had not been endorsed by the payee, and with a view to give credit to the note, for the benefit of the immediate maker, at whose request they became a party to the same.

Whatever diversities of interpretation may be found in the authorities, where either a blank endorsement or a full endorsement is made by a third party on the back of a note, payable to the payee or order, or to the payee or bearer, as to whether he is to be deemed an absolute promisor or maker, or guarantor or endorser, there is one principle upon the subject almost universally admitted by them all, and that is, that the interpretation of the contract ought in every case to be *such as will carry [* 350] into effect the intention of the parties; and in most instances it is conceded that the intention of the parties may be made out by parol proof of the facts and circumstances which took place at the time of the transaction. Story on Prom. Notes, secs. 58, 59, and 479.

When a promissory note, made payable to a particular person or order, as in this case, is first endorsed by a third person, such third person is held to be an original promisor, guarantor, or endorser, according to the nature of the transaction and the understanding of the parties at the time the transaction took place. If he put his name on the back of the note at the time it was made, as surety for the maker, and for his accommodation, to give him credit with the payee, or if he participated in the consideration for which the note was given, he must be considered as a joint maker of the note. On the other hand, if his endorsement was subsequent to the making of the note, and he put his name there at the request of the maker, pursuant to a contract with the payee for further indulgence or forbearance, he can only be held as a guarantor. But if the note was intended for discount, and he put his name on the back of it with the understanding of all the parties that his endorsement

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would be inoperative until it was endorsed by the payee, he would then be liable only as a second endorser in the commercial sense, and as such would clearly be entitled to the privileges which belong to such endorsers.

Decided cases are referred to by the counsel of the defendants, which seemingly deny that such parol proof of the attending circumstances of the transaction is admissible in evidence; but the weight of authority is greatly the other way, as is abundantly shown by the cases cited on the other side. Whenever a written contract is presented for construction, and its terms are ambiguous or indefinite, it is always allowable to weigh its language in connection with the surrounding circumstances and the subject matter, and we see no reason, as question of principle, why any different rule should be adopted in a case like the present. Such evidence

has always been received in the courts of Massachusetts, [* 351] as appears from * numerous decisions, and the same rule prevails in most of the other States at the present time. 1 Am. Lea. Cas. (4th ed.) 322. Repeated decisions to the same effect have been made in the courts of New York, and until within a recent period it appears to have been the settled doctrine in the courts of that State.

Recent decisions, it must be admitted, wear a different aspect; but they have not had the effect to produce a corresponding change in other States, and, in our view, deny the admissibility of parol evidence in cases where it clearly ought to be received. *Hawkes v. Phillips et al.* 7 Grey, 284.

Applying these principles to the present case, it is obvious that the contract of the two defendants whose firm name is upon the back of the note was an original undertaking, running clear of all questions arising out of the statute of frauds.

They placed their names there at the inception of the note, not as a collateral undertaking, but as joint promisors with the maker, and are as much affected by the consideration paid by the plaintiff, and as clearly liable in the character of original promisors, as they would have been if they had signed their names under the name of the other defendant upon the inside of the instrument. Numerous decisions in the State courts might be cited in support of the proposition as stated, but we think it unnecessary, as they will be found collated in the elementary works to which reference has already been made, and in many others which treat of this subject.

Another objection to the right of recovery in this case deserves a brief notice. It is insisted by the counsel of the defendants that the complaint or declaration is not sufficient to maintain this suit

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against these defendants as original promisors. That objection must be considered in connection with the system of pleading which prevailed in the courts of the Territory at the time the suit was commenced. By that system, suitors were only required to state the facts which constituted the cause of action. In this case the plaintiff followed that mode of pleading, and we think he has set forth enough to constitute a substantial compliance with the law of the territory and the practice of the court where the suit was instituted. * He alleges, among other things, [* 352] that the defendants whose firm name is on the back of the note placed it there for the purpose of becoming sureties and security to him as payee for the amount therein specified. That allegation, to use the language of the statute of Minnesota, is expressed in ordinary and concise language, and in such a manner as to be easily understood, and that is all which is required by the law of the territory prescribing the rules of pleading in civil cases. Under the system of pleading which prevailed in the courts of the territory, the objection cannot be sustained.

The judgment of the supreme court of the territory is therefore affirmed with costs.

JOHN P. JETER, Plaintiff in Error, v. JAMES HEWITT and others.

22 H. 352.

RES JUDICATA.

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1. Under the monition act of Louisiana, where the proper notices have been given, a judgment of the court confirming a judicial sale is conclusive on every body.
2. Where a person interested in property so sold brings a suit in the circuit court of the United States to assert a right to such property, he is bound by the laws of Louisiana and by the judgment of her courts.
3. The proceedings in monition relied on in this case are conclusive of the rights of the parties.

WRIT of error to the circuit court for the eastern district of Louisiana. The case is fully stated in the opinion.

Mr. Carlisle and Mr. Badger, for plaintiff in error.

Mr. Benjamin, for defendants.

* Mr. Justice CAMPBELL delivered the opinion of the court. [* 358]

The plaintiff commenced this suit to recover a plantation and slaves, with the horses, mules, implements, and other things enumerated in the petition, destined to the use and convenience of

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the plantation, and for an account of rents and issues for a term of years. He deduces his title from Christopher Ford, who was in possession of the plantation at his death, in 1849, through a conveyance from Louisa W. Ford, the widow, executrix, and instituted heir of her deceased husband, dated in November, 1850.

The defendants show, that in November, 1845, two banking corporations of Louisiana (Bank of Louisiana and New Orleans Canal and Banking Company) sold to Christopher Ford this plantation and twenty-eight slaves, for the price of \$40,000, a portion of which was paid in cash, and for the remainder a credit was given, and that Ford mortgaged the property conveyed to him, and sixty-eight other slaves, which he agreed to place on the plantation. On the same day, he obtained from the Bank of Louisiana a loan of money, which was secured by another mortgage on the same [* 359] property. At the time of the death of Ford, he was in arrears for the debt and interest that had accrued.

In the mortgage to the Bank of Louisiana, Ford agrees not to alienate, deteriorate, or encumber, the property mortgaged, and confesses judgment for the sum of money to be paid. He renounces the benefit of the laws that require property seized on execution to be sold on credit or after appraisement, and agrees, that if the debt shall not be paid according to the tenor of the mortgage, then the banking company may obtain an order of seizure and sale, and sell the mortgaged premises and slaves by public auction, for cash, after an advertisement of thirty days. He waives his privilege to be sued in any other district than the first judicial district of the State, and agrees that process may issue from the district court for the first district, or any other court in New Orleans having jurisdiction.

The charter of the bank provides, that upon all mortgages executed under the act, the bank shall have the right to seize the property mortgaged, in whatever hands it may be, in the same manner and with the same facilities that it could be seized in the hands of the mortgager, notwithstanding any sale or change of the title or possession thereof, by descent or otherwise.

On the 16th December, 1850, after the conveyance of Mrs. Ford to the plaintiff, the Bank of Louisiana instituted a suit upon the second mortgage above mentioned; a writ of seizure and sale issued, and the property was advertised for sale the 1st February, 1851. Jeter was present at the sale that took place on that day, bid for the property the sum of seventy thousand dollars, and it was adjudicated to him at that price. He offered a draft for the amount of the execution, on merchants residing in New Orleans, and asked for time to go for the money; and these being refused, the property

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of Ascension, under a writ from the court, without any knowledge of neglect, or illegality, or want of jurisdiction; that the opponent had sold her interest in the property, and was estopped to oppose the sale by her acts. They pleaded that the mortgage contained a confession of judgment, and no notice was necessary to any one to obtain a judgment; and assert there is no just cause to deny the homologation of the sales.

The district court, at the November term, 1852, entered an order describing the property embraced in the sheriff's deed, and reciting the facts relative to the grant of the monition, and the motion for the homologation of the sale, and conclude:

"The court being satisfied, from inspection of the record and evidence adduced, that all the formalities of the law have been complied with; that the advertisements required have been inserted and published for the space of time and in the manner required by law; that the property has been correctly described, and the price at which it was purchased truly stated; and there being but one opposition filed thereto, to wit, by Mrs. Christopher Ford, it is adjudged and decreed that said sheriff's sale be confirmed and homologated according to law, in so far as the same has not been opposed."

The cause was continued in the district court, upon the opposition proceedings of Mrs. Ford.

In June 1853, the district court rendered the judgment upon this opposition, that the sale was null and void, for the reasons pleaded, and condemned the petitioners (Hewitt & Heron) to costs. An appeal was taken to the supreme court of Louisiana. That court rendered its judgment in 1854.

The court say: The appellants are *bona fide* purchasers at a judicial sale of the plantation and slaves, at the instance of a mortgage creditor, at a fair price, which has been paid, and possession taken, and improvements made. That, as executrix, Mrs. Ford had done nothing, except to obtain probate of the will, and as heir she has sold her interest to Jeter in the estate, he covenant-
[* 362] ing to pay the debts, and that she gave him a power * to sell and administer the estate. That Jeter had failed to comply with his bid at the sheriff's sale, and that then the appellants had become the purchasers, settled with mortgage creditors, and took possession. "Under these circumstances," the court conclude, "we think it inequitable to permit this sale to be questioned by the executrix, whom we consider as merely attempting to aid Jeter, her vendee and agent, in a speculation, at the expense of these *bona fide* purchasers, under the guise of representing

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a small minority of the creditors, whom she personally and Jeter are bound to pay. It is obvious, under the facts above stated, that neither of them, Jeter and Mrs. Ford, would be permitted personally to question the sale, on account of the alleged informalities." And thereupon the decree of the district court was reversed, and the opposition dismissed, reserving to the creditors their right, if any, to sue for a rescission of the sale. *Bank of Louisiana v. Ford*, 9 Ann. 299.

The effect of the judgment confirming and homologating the sale is declared in the statute that authorizes the monition to issue, in favor of purchasers of property "at sheriff's sales," at those "made by the syndics of insolvents' estates," at those "made by the authority of justice," or of courts, and to enable them "to protect themselves from eviction from the property so purchased," and "from any responsibility to the possessors of the same." It confers upon the order made by the court upon the monition, "the authority of *res judicata*," so as to operate "as a complete bar against all persons, whether of age or minors, whether present or absent, who may thereafter claim the property so sold, in consequence of all illegality or informality in the proceedings, whether before or after judgment;" and the judgment of homologation is to be received and considered "as full and conclusive proof that the sale was duly made according to law, in virtue of a judgment or order legally and regularly pronounced on the interest of the parties duly represented," saving and excepting, "that it shall not render a sale valid made in virtue of a judgment, when the party cast was not duly cited to make defense."

The judgment of the district court homologating the sale *concluded all parties except Mrs. Ford, who had [*363] filed opposition to the order. Subsequently the supreme court overruled her opposition, assigning as the reason that the sale was fair, the purchasers *bona fide*, and the opponent had no interest in the subject of contest. The plaintiff, whether we consider him as acting independently or in connection with Mrs. Ford, and under the "guise of her name" and character, is affected by these orders.

By the very terms of the statute, all the objections that apply to the manner of conducting the sale and to the form of the judgment are cut off by the judgment of homologation.

The only question that the judgment leaves open is, whether the court that rendered the original judgment had jurisdiction of the person. But this question was presented to the district court and the supreme court upon the opposition of Mrs. Ford, in the sa-

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manner in which it is presented to this court. The facts of the death of Ford, the probate of his will in the parish of Ascension before the order of seizure, the seizure within three days from the date of the order, the notice directed to Ford, and left at the house of the overseer, in the absence of Mrs. Ford, and after her sale to Jeter, the presence of Jeter at the sale, the adjudication to him of the property upon his bid, and the resale upon his neglect to comply with the terms of the sale, and the purchase by Heron & Hewitt, with the sheriff's deeds to him, were presented to those courts upon the evidence that has been submitted to this court.

The decision of the supreme court of Louisiana was, that as executrix, Mrs. Ford did not really and truly represent the interest of the creditors of her husband in her opposition, and that she used that title to protect her own interest and that of Jeter, her agent and vendee—but that they would not be permitted “personally to question the sale, on the score of the alleged irregularities.”

The authority of *res judicata* as a medium of proof is acknowledged in the civil code of Louisiana; and its precise effect in the particular case under consideration is ascertained in the statute [* 364] that allows the proceeding by monition. Under the *system of that State, the maintenance of public order, the repose of society, and the quiet of families, require that what has been definitely determined by competent tribunals shall be accepted as irrefragable legal truth. So deeply is this principle implanted in her jurisprudence, that commentators upon it have said, the *res judicata* renders white that which is black, and straight that which is crooked. *Facit excurvo rectum, ex albo nigrum*. No other evidence can afford strength to the presumption of truth it creates, and no argument can detract from its legal efficacy.

The jurisdiction of the courts of the United States, in cases like the present, is derived exclusively from the fact that the parties are citizens of different States. The rights of these parties originate in the law of Louisiana, and must be ascertained by a reference to the principles adopted and administered by her constituted authorities. We are not invested with power to review the sentences of her courts, except in a few cases arising under the constitution and laws of the United States; nor is it our province to augment or diminish their value, or to place any different estimate upon them than they have in the municipal code of the State. They are entitled to the same force and effect here as they have in Louisiana.

The statement of the case of these parties shows conclusively that the whole subject of this controversy has been legally submitted

Aspinwall v. Commissioners of the County of Daviess.

to the tribunals of Louisiana, and that the adjudication was in favor of the defendants.

This was the decision of the circuit court of the United States in Louisiana, from whose judgment this writ of error has been taken. It remains for us only to affirm that judgment.

Judgment affirmed.

WILLIAM H. ASPINWALL and others, v. THE BOARD OF COMMISSIONERS
OF THE COUNTY OF DAVIESS.

22 H. 364.

COUNTY BONDS.

1. Where the charter of a railroad company authorized the counties through which the road ran to take stock and issue bonds in payment, neither the charter nor the vote of the citizens in favor of a subscription constitute a contract with the company until the subscription is actually made by the proper officers of the county.
2. An amendment to the constitution of the State, made after the vote and before the subscription, forbid the counties from loaning their credit or borrowing money to pay such subscriptions; and the bonds issued after this in payment of a subscription made after the new constitution went into effect were void.

THIS case came to this court on a certificate of division of opinion between the judges of the circuit court for the district of Indiana. The nature of the questions certified and the facts of the case are stated in the opinion.

Mr. Vinton, Mr. Benjamin, and Mr. Judah, for plaintiffs.

Mr. Porter and Mr. McDonald, for defendants.

* Mr. Justice NELSON delivered the opinion of the court. [* 374]

The case comes up from the circuit court of the United States for the district of Indiana.

The suit was brought by the plaintiffs against the board of commissioners of the county of Daviess, to recover two installments of interest accruing upon certain bonds issued by the board for stock subscribed to the Ohio and Mississippi Railroad Company; and on the hearing the following questions arose, upon which the judges of the court divided in opinion.

1. Whether, by the said act of incorporation of the said railroad company, and the amendment thereto of January 15, 1849, any such right to county subscriptions vested in said company as would exclude the operation of the new constitution * of [* 375] Indiana, which took effect on the 1st day of November, 1851.

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2. Whether, by virtue of the said acts, and of the said election in the declaration set forth, the Ohio and Mississippi Railroad Company acquired any such right to the subscription of the defendants as would be protected by the constitution of the United States against the new constitution of Indiana, which took effect on the 1st day of November, 1851.

The charter of the railroad company, passed February 14, 1848, provides that it should be lawful for the county commissioners through which the road passed to subscribe for stock on behalf of the county, at any time within five years after the opening of the books of subscription, if a majority of the qualified voters of said county, at an annual election, shall vote for the same.

The amended act of January 15, 1849, made the holding of the election in the county peremptory on the first Monday of March (then) next, to determine the question of subscription or not to the stock.

The election was held in pursuance of this law, and a majority of the votes of the county cast in favor of the subscription. This was on the first Monday of March, 1849; and on the 10th September, 1852, the board of commissioners, in pursuance of the acts and of election aforesaid, subscribed for six hundred shares of the stock of the railroad company, of the value of \$50 per share, in the whole amounting to \$30,000, and in payment of said stock issued thirty bonds, of \$1,000 each, duly signed and sealed by the president of the board of commissioners, and attested by the auditor of the county, and delivered the same to the president and directors of the railroad company. By the terms of the obligations, they were made payable at the North River Bank in the city of New York, twenty-five years from date, to the railroad company or bearer, with interest at the rate of six per cent. per annum, payable annually on the 1st March, at the bank aforesaid, upon the presentation and delivery of the proper coupons attached, signed by the auditor of the said county. The plaintiffs are the holders and owners of sixty of these coupons.

[* 376] * The new constitution of the State of Indiana contains the following provision:

“No county shall subscribe for stock in any incorporated company, unless the same be paid for at the time of such subscription; nor shall any county loan its credit to any incorporated company, nor borrow money for the purpose of taking stock in any such company.” Sec. 6, art. 10, constitution of Indiana.

This constitution took effect on the 1st November, 1851. The subscription was not made nor bonds issued by the board of com-

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missioners of the county, as we have seen, until the 10th September, 1852. The question therefore arises whether the subscription and bonds, thus made and issued after the constitution went into effect, were not forbidden by the 6th section of the 10th article above cited, and therefore null and void.

The precise question first presented by the court below, upon which the judges divided, is as follows:

Whether, by the said act of incorporation of said railroad company, and the amendment thereto of January 15, 1849, any such right to county subscriptions vested in said company as would exclude the operation of the new constitution of Indiana, which took effect on the 1st November, 1851.

The question admits, at least by implication, that this sixth section of the constitution applies to the acts of the board of commissioners, in making the subscription and issuing the bonds; but presents the question, whether, at the time it went into effect, there was not such a right to the subscription and bonds vested in the railroad company as could be upheld, notwithstanding the constitutional prohibition?

This view is sought to be sustained by force of the 10th section of the 1st article of the constitution of the United States, which provides that no State shall pass any law "impairing the obligation of contracts."

The argument is, that the provisions in the railroad charter and amendment, conferring power upon the board of commissioners of the county, and making it their duty to subscribe for stock, and issue bonds therefor, if a majority of the *qualified [*377] voters of the county should determine at an election in favor of the same, import a contract with the railroad company on behalf of the State, which is protected by the clause referred to in the constitution of the United States; and hence the State constitutional prohibition is inoperative to annul the subscription or the bonds. That this right to the subscription and bonds, resting upon a contract in the charter, is unaffected by any subsequent statute or organic law of the State.

Without stopping to inquire whether or not the power conferred upon the board of commissioners in the charter and amendments of the railroad company, in the form and with the conditions therein mentioned, constitutes a contract, the court is of opinion that, in view of the body upon which the power is conferred, and of the nature of the power itself, no such contract existed, if any, as is contemplated by this clause of the federal constitution. The power or authority contained in the charter, and out of which the right in

question is claimed to arise, is conferred upon the county, a public corporation or civil institution of government, and upon public officers employed in administering its laws; and the power or authority itself concerns this body in its public political capacity.

Chief Justice Marshall observed, in *Dartmouth College v. Woodward*, (4 Wh. 627,) that the word contract, in its broadest sense, would comprehend the political relations between the government and its citizens; would extend to offices held within a State for State purposes, and to many of those laws concerning civil institutions, which must change with circumstances and be modified by ordinary legislation, which deeply concern the public, and which, to preserve good government, the public judgment must control. But, he observes, the framers of the constitution did not intend to restrain the States in the regulation of their civil institutions adopted for internal government, and that the instrument they have given us is not to be so construed, (p. 629.) And Mr. Justice Washington observed, in the same case, (p. 663,) in respect to public corporations, which exist only for public purposes, such as towns, cities, &c., the legislature may, under proper limitations, [* 378] * change, modify, enlarge, or restrain them; securing, however, the property for the use of those for whom, and at whose expense, it was purchased. (See also pages 693, 694.)

It would be difficult to mention a subject of legislation of more public concern, or in a greater degree affecting the good government of the county, than that involved in the present inquiry. The power conferred upon the board of commissioners by the provisions in the charter, among other things, embraced the power of taxation, this being the ultimate resort of paying both the principal and interest of the debt to be incurred in the subscription and issuing of the bonds.

The second question presented, upon which the judges differed, is as follows:

Whether, by virtue of said acts, and of the said election in the declaration set forth, the Ohio and Mississippi Railroad Company acquired any such right to the subscription of the defendants as would be protected by the constitution of the United States against the new constitution of Indiana, which took effect the 1st November, 1851.

The acts of 1848 and 1849, already referred to, made it the duty of the board of commissioners to subscribe for the stock, if a majority of the qualified voters at an election determined in favor of the subscription.

The election took place on the first Monday of March, 1849, when

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a majority of the votes was cast for the subscription. The constitution of Indiana took effect 1st November, 1851. But the subscription was not made till the 10th September, 1852, and the bonds were issued after this date. It is insisted that the contract of subscription became complete when, at the election, a majority of the votes was cast in its favor, and did not require the form of a subscription on the books for the stock of the railroad company to make it obligatory upon the parties; and which, if true, it is agreed the contract would be protected within the constitution of the United States, as it would then have been complete before the constitutional prohibition of Indiana. But the court is unable to concur in this view. It holds, that a subscription was necessary to create a contract binding upon the county, on one side, to take the *stock and pay in the bonds; and upon the other, to [* 379] transfer the stock, and receive the bonds for the same. Until the subscription is made, the contract is unexecuted, and obligatory upon neither party.

We have arrived at the conclusion that both of the questions presented to us by the court below must be answered in the negative with some reluctance, as, for aught that appears in the case, the subscription to the stock by the board of commissioners was made and the bonds issued in good faith to the railroad company, and also sold by it, and purchased by the plaintiff in confidence of their validity; but, after the best consideration the court has been able to give the case, it has been compelled to hold, for the reasons above stated, that the subscription was made, and the bonds issued, in violation of the constitution of Indiana, and therefore without authority, and void.

We have not been able to find that the courts of Indiana have passed upon this clause of their constitution, and have, therefore, been obliged to expound it with the best lights before us. We should have felt very much relieved, if a construction had been given to it by the judicial authorities of the State, and have readily followed it.

Order.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Indiana, and on the points or questions on which the judges of the said circuit court were opposed in opinion, and which were certified to this court for its opinion agreeably to the act of congress in such case made and provided, and was argued by counsel. On consideration whereof, it is the opinion of this court:

1. That by the act of incorporation of the Ohio and Mississippi

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Railroad Company of the 14th February, 1848, and the amendment thereto of January 15th, 1849, no such right to county subscriptions vested in said company as excluded the operation of the new constitution of Indiana, which took effect on the 1st day of November, 1851.

[* 380] *2. That by virtue of the said acts, and of the said election in the declaration set forth, the Ohio and Mississippi Railroad Company acquired no such right to the subscription of the defendants as would be protected by the constitution of the United States against the new constitution of Indiana, which took effect on the 1st day of November, 1851. Whereupon it is now here ordered and adjudged by this court, that it be so certified to the said circuit court.

ADAM OGILVIE and others, Appellants, v. THE KNOX INSURANCE COMPANY and others.

22 H. 380.

CREDITOR'S BILL AGAINST SHAREHOLDERS OF A CORPORATION.

1. A court of equity has jurisdiction to compel the stockholders to pay the sums unpaid on their stock subscription of an insolvent corporation on a bill filed by a judgment creditor.
2. After the subscribers to the stock of an insurance company have organized the corporation and paid the first installment, and conducted the business for several years in expectation of large profits, it is too late, when they found that the losses exceeded the profits, to set up the want of truth in representations made to them when they subscribed for the stock.
3. In such a bill, where the object is to obtain satisfaction of plaintiff's judgment, it is not indispensable that all the creditors or all the shareholders should be parties to the suit.

APPEAL from the circuit court for the district of Indiana. The case is fully stated in the opinion.

Mr. Gillet and Mr. Judah, for appellants.

Mr. Crawford, for appellees.

[* 387] *Mr. Justice GRIER delivered the opinion of the court. The complainants in this case are judgment creditors of the Knox Insurance Company. The numerous other defendants are stockholders of the company, and are severally charged as debtors to it, for the unpaid portion of the stock subscribed by them.

The company is insolvent, or at least is unable to pay its creditors, without calling in the capital subscribed and secured, but not

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actually paid in cash. This it has failed or refused to do. This bill is filed to compel these stockholders or debtors to the corporation to pay the amount of their debts, in order that the creditors of the company may obtain satisfaction.

The bill was taken *pro confesso* as against the corporation. The other defendants, being corporators, are consequently concluded as to the averments of the bill affecting them as such. As stockholders who have not paid in the whole amount of the stock subscribed and owned by them, they stand in the relation of debtors to the corporation for the several amounts due by each of them. As to them, this bill is in the nature of an attachment, in which they are called on to answer as garnishees of the principal debtor.

Where a number of special partners are incorporated to carry on the business of insurance, the stock subscribed and owned by the several stockholders or partners constitutes the capital or fund publicly pledged to all who deal with them. Insurance companies or corporations, unless they have the privilege of using their capital for banking purposes, seldom require the actual payment of it all in cash. Contracts of *insurance or indemnity, [*388] though not literally "gaming contracts," are nevertheless in the nature of wagers against the happening of a certain event. The calculation of chances is greatly in favor of the insurer. In a large number of policies, it is but reasonable to expect that the amount of premiums will exceed that of the losses. The insured are thus made to pay one another, and with common good fortune afford an overplus to make a dividend for the insurers. Hence the Knox Insurance Company, like others of the same description, did not require their stockholders to pay in cash more than ten per cent. of their several shares. They were allowed to retain the remaining ninety per cent. in their own possession, substituting therefor their bonds, or other securities. Thus every stockholder became a borrower from, and debtor to, the capital stock of the company. If in the course of events the chances were favorable, a dividend of twenty per cent. on capital would give a profit of two hundred on the money actually paid out by them. On the contrary, if they were adverse, the capital represented by securities must necessarily be paid in to satisfy the just debts of the company.

The ninety per cent. retained by the stockholders is as much a part of the capital pledged as the cash actually paid in. When that portion of the capital represented by these securities is required to pay the creditors of the company, the stockholders cannot be allowed to refuse the payment of them, unless they show such an

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equity as would entitle them to a preference over the creditors, if the capital had been paid in cash.

Let us now examine their defense, and see if they have established such an equity.

They do not deny that they paid the ten per cent., gave their securities for the balance, and have received their certificates for their several shares of stock; but they contend that they are not bound to pay these securities, because the agent of the corporation, who took the subscriptions of stock, made certain representations concerning the state of the affairs of the corporation, which were not true; and, as a consequence thereof, they are not bound to pay these securities.

[* 389] *The numerous defendants, with some immaterial variations and qualifications, adopt the answer of their co-defendant, Collum, which we shall give *verbatim* from the record, to show we have not misstated or mistaken the nature of the defense set up.

"And, by the way of defense to said suit, said Collum alleges that just before he gave said note, accepted said first bill, Robert N. Carnan, an agent of said insurance company, came to Jeffersonville to procure persons there to give notes and bills for stock in said insurance company; and in order to induce said Collum to give his said note, and accept said first bill for such stock, said Carnan, as such agent, then and there falsely and fraudulently said and represented to said Collum, and in his hearing, that stock in said insurance company to the amount of seventy-five dollars had then been subscribed for at Vincennes, and on the Wabash river, and all of said amount had then been paid or secured as the charter of said insurance company required. Said Collum did not then know, nor then have the means of knowing, to the contrary of said representations, and he fully believed them to be true, and with that belief he gave his said note, and accepted said two bills for stock in said insurance company; and if he had not fully believed said representations, he would not have given said note nor accepted said bills, or either of them. At the time said representations were so made, and said given and said first bill accepted, there had not been more than twenty-five thousand dollars of stock in said insurance company subscribed for and paid and secured, as said charter required, at Vincennes, on the Wabash river, which said Carnan then well knew. Said Carnan also, at and just before said Collum made his said note and accepted his said first bill, represented to him that said insurance company then had \$40,000 of funds on hand, mostly in eastern exchange, which they could not

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dispose of at Vincennes, and they wished to get stockholders at Jeffersonville, so as to have an officer of said insurance company there, and they would then send those funds there to be sold and used. Said Collum did not then know, and had no means of knowing, to the contrary of said *representation, but [* 390] he believed it, and it was a strong inducement with him to make his said note and accept his said bills; yet he is now informed and believes said representation was grossly false, and that said insurance company did not at that time have and had not at any time had that sum or anything like that sum of money on hand, and mostly in eastern exchange, which they could not dispose of at Vincennes."

Carnan, who was examined as a witness denies the charges made in this answer, and declares that he was not authorized by the company to make such representations, and did not make them.

To establish their defense, several of the defendants themselves were called as witnesses, alleging that, as their responsibility was several, and not joint, each one may be called as a witness for all the rest. Much of the argument of this case has been expended on the question of the competency of these witnesses to testify in their own case; but we do not think it necessary to decide it, as there are other facts in the case which show clearly that the matter pleaded cannot affect the relative rights of the parties in the case, assuming it to be true.

Those who seek to set aside their solemn written contracts, by proving loose conversations, should be held to make out a very clear case; and when they charge others with fraud, founded on such evidence, their own conduct and acts (which speak louder than words) should be consistent with such a hypothesis. Assuming the fact that Carnan did make the representations charged, what was the conduct of these Jeffersonville stockholders, who now seek to repudiate their contracts on the allegation of fraud? After having a full opportunity to examine for themselves into the affairs of the company, they alleged no fraud, nor expressed any desire to withdraw their subscriptions; on the contrary, when fully informed that the amount of stock subscribed at Vincennes did not equal that taken at Jeffersonville, and when an offer was made to increase the Vincennes subscriptions, so as to equal those at Jeffersonville, the defendants and those who acted with them *objected*, and insisted that the lower the amount of stock the *higher would be the dividend, and consequently it [* 391] had better not be increased till after the first dividend of *twenty-five* per cent. had been made.

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After the defendants had a full opportunity to know the situation of the company, its funds and its property, they organized at Jeffersonville a branch of the corporation, having resident directors at that place. This board met from time to time, through the months of April, May, June, July, and up to 13th August, 1850. While there was a prospect of a dividend of 250 per cent. on the amount of *cash* paid in, their eyes were shut to the deceit supposed to have been practiced on them. In the month of May, a fire at Owensville, Kentucky, was reported, in which the company lost about \$50,000. This seemed to injure the prospect of the large dividend; yet even then it was not so clearly perceived that the defendants were defrauded.

The directors at Jeffersonville, who represented their interests, continued to meet till the middle of August, and till a succession of losses made it apparent that the capital of the company would be nearly all required to pay for the losses incurred. When these facts became patent, the directors at Jeffersonville, at their last meeting in August, "*after taking time to consider what was best to be done,*" concluded to consider themselves defrauded, and withdraw their capital from the company.

We need not cite authorities to show that this discovery was made too late, and that a court of equity cannot receive such a pretense as a valid defense against the creditors of this corporation.

The objection made to the bill for want of proper parties is equally untenable. The creditors of the corporation are seeking satisfaction out of the assets of the company to which the defendants are debtors. If the debts attached are sufficient to pay their demands, the creditors need look no further. They are not bound to settle up all affairs of this corporation, and the equities between its various stockholders or partners, corporators or debtors. If A

is bound to pay his debt to the corporation, in order to [* 392] satisfy its creditors, he cannot * defend himself by pleading that these complainants might have got their satisfaction out of B quite as well. It is true, if it be necessary to a complete satisfaction to the complainants that the corporation be treated as an insolvent, the court may appoint a receiver, with authority to collect and receive all the debts due to the company, and administer all its assets. In this way, all the other stockholders or debtors may be made to contribute.

For these reasons, we are of opinion that the decree of the circuit court should be reversed, with costs, and that the record be remanded, with instructions to that court to enter a decree for the complainants against the respondents severally, for such amount as

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it shall appear was due and unpaid by each of them on their shares of the capital stock of the Knox Insurance Company, and to have such other and further proceedings as to justice and right may appertain.

THE UNITED STATES, Appellants, v. HENRY F. TESCHMAKER and others.

22 H. 392.

CALIFORNIA LAND GRANTS—ABSENCE OF RECORDED TITLE.

The paper or document of concession by the governor, if genuine, of which there is doubt, stands alone. None of the preliminary steps required by the regulations of 1828, such as petition, reference for report, or report of the proper officer, a delivery of possession, or approval of the departmental assembly, is found. Evidence of actual possession is unsatisfactory, and the endorsement in the concession that it is recorded in the proper book is shown to be false. For these reasons the judgment of the district court confirming the claim is reversed, with leave to produce further evidence.

APPEAL from the district court for the northern district of California. The case is fully stated in the opinion.

Mr. Black, attorney general, and *Mr. Stanton*, for appellants.

Mr. Gillet, for appellees.

* Mr. Justice NELSON delivered the opinion of the court. [* 401]

This is an appeal from a decree of the district court of the United States for the northern district of California.

The case involved a claim to sixteen square leagues of land known by the name of "La Laguna de Lup-Yomi," situate north of Sonoma, in the county of Napa, California. It was presented to the board of land commissioners on behalf of the appellees, who derive their title from the two brothers, Salvador and Juan Antonio Vallejo, claiming to be the original grantees of the Mexican government. The board rejected the claim, but, on appeal to the district court, and the production of further evidence, that court affirmed it.

The first document produced is a petition of the two brothers, S. and J. A. Vallejo, to the senior commandant general and director of the colonization of the frontiers, for a grant of eight leagues of lands each, reciting that they were desirous of establishing a ranch in the Laguna de Lup-Yomi, situate twenty leagues north of this place, (Sonoma,) which tract is uncultivated, and in the power of a multitude of savage Indians, who have committed and are daily

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committing many depredations; and being satisfied that the tract does not belong to any corporation or individuals, they earnestly ask the grant, offering to domesticate the Indians, and convert them by gentle means, if possible, to a better system of life. Salvador Vallejo adds, that being in actual service in quality of captain of cavalry, and not having received his pay, he proposes to [* 402] apply \$2,500 out of his pay for his portion of the *land.

This petition was dated at Sonoma, October 11th, 1838.

Under date of March 15th, 1839, the senior commandant general, M. G. Vallejo, a brother of the petitioners, accedes to their petition so far as to permit them to occupy the tract, but, for the accomplishment of the object, they must hasten to ask a confirmation from the departmental government, which will issue the customary titles; and, at the same time, they must endeavor to reduce the wild nature of the Indians, assuring them that the government wishes a treaty and friendship with them.

The next document is a title, in form, granted by the governor, Micheltorena, dated Monterey, 5th September, 1844. At the foot of the grant is a memorandum, as follows:

“Note has been made of this decree in the proper book, on folio 4.

“In the absence of the commandante, FRANCIS. C. ARCE.”

The signatures of M. G. Vallejo to the permit of occupation, and of Micheltorena and F. C. Arce, the governor and acting secretary, are genuine, if three witnesses are to be believed—Castenada, W. D. M. Howard, and Salvador Vallejo, one of the original grantees. The proof of possession and occupation is slight, and not entitled to much consideration, in passing upon the equity or justice of the title, or even upon its *bona fides*.

This proof rests mainly upon the testimony of S. Vallejo. He was examined twice on the subject—once when the case was before the board of commissioners, and again when on appeal before the district judge. In his first examination, he states, that immediately after permission was given to occupy the ranch (March, 1839) he placed on the land about one thousand head of cattle, between three and four hundred head of horses, and from eight hundred to one thousand head of hogs; that he built a house on the land the same year, and also corrals, and left an overseer and servants in charge of the place.

[* 403] *In his second examination, he states, that in the year 1842 or 1843 he placed cattle on the ranch, built a house and corrals, and in the year 1843 or 1844 received a title for the land; that he then lived on it, but was frequently absent visiting

his house and lot in Sonoma, and his other farms, but always left a mayor domo on the ranch; and during this time he cultivated beans, corn, pumpkins, watermelons, &c. The last house he built on the place was about the time the country was invaded by the Americans. That during the time mentioned he had on the place from 1,500 to 2,000 head of cattle, 500 to 600 head of horses, and from 1,500 to 2,000 head of hogs. He further states, that most of his stock was subsequently stolen and driven off by the Indians and emigrants. This evidence is slightly corroborated by the testimony of Castenada and Carillo.

From the numerous cases that have already been before us, as well as from our own inquiries into the customs and usages of the inhabitants of California, especially those engaged in the business of raising cattle and other stock, this mode of occupation furnishes very unsatisfactory evidence of possession and cultivation of the land in the sense of the colonization laws of Mexico. Any unappropriated portion of the public lands was open to similar possession and occupation without objection from the public authorities. Indeed, according to the laws of the Indies, the pastures, mountains, and waters, in the provinces, were made common to all the inhabitants, with liberty to establish their corrals and herdsmen's huts thereon, and freely to enjoy the use thereof, and a penalty of five thousand ounces of gold was imposed on every person who should interrupt this common right. (2 White's Recop. 56.)

There is also a fact stated by the witness Vallejo himself, that is calculated to excite distrust as to the extent of the possession and occupation, and for the purpose stated. He says that there were constant revolutions among the Indians at the time; that it was unsafe for families to live there, and that the alcalde at Sonoma refused to deliver him judicial possession in 1845, on account of the danger.

It is quite apparent, also, from the testimony of this [404] witness, that the huts built for the herdsmen of the cattle were of a most unsubstantial and temporary character. No possession of any kind is shown since the cattle and other stock were carried off by the Indians and emigrants. When that took place does not appear; but doubtless as early as the first disturbances in the country, in the fore part of the year 1846.

The possession and occupation, therefore, even in the loose and general way stated, was only for a comparatively short time.

We have said that the signatures of the officers to the documentary evidence of the title are genuine, if we can believe the witnesses—Castenada, Howard, and Vallejo; but, as all of these officials were

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living after the United States had taken possession of the country during the war, and even after the cession by Mexico, and, with the exception of the governor, resided in California, these signatures may be genuine, and still the title invalid. It was practicable to have made the grant in form genuine, but ante-dated.

The permit to take possession of the tract, in connection with the short and unsubstantial character of the possession, is not of much importance in making out the claim. Vallejo had no power to dispose of the public lands. We do not understand that his permission to occupy, as director of colonization on the frontiers, laid the governor or Mexican government under any obligations to grant the title. If followed by valuable and permanent improvements, considerations might arise in favor of a claimant that should influence a government, when called upon to grant the property to another. We think, therefore, that the claim rests chiefly, if not entirely, upon the grant of the title by the governor of the 4th September, 1844.

This grant stands alone. None of the usual preliminary steps prescribed by the regulations of 1828, such as the petition, marginal reference for a report as to the situation and condition of the land, report of the proper officers and minute of concession, were observed. These, with satisfactory proof of the signatures [* 405] to the papers, give some character to the grant, and *tend to the establishment of its genuineness. Even the permit of Vallejo is not noticed by the governor, nor any present occupation of the premises by the grantees.

So far, therefore, as respects the title, or even any rightful claim to the tract, it depends mainly upon proof of the signatures of Micheltorena and of F. C. Arce, the acting secretary. There is no record of the title in the proper book, shown in the case, nor exists in fact, as it is understood this book of records exists for the years 1844, 1845, and no record is there found. The memorandum, therefore, at the foot of the grant, by Arce, the secretary, "Note has been made of this decree in the proper book, on folio 4," is untrue. Nor has there been found any approval of the grant by the departmental assembly, for those records are extant, as found in the Mexican archives. These archives are public documents; which the court has a right to consult, even if not made formal proof in the case. The absence of any record evidence is remarkable, if the title is genuine, as one of the grantees, Juan Antonio Vallejo, resided at the time in Monterey, where these records were kept, and where all the formalities of a regular Mexican grant might readily have been complied with. The parties, also, were men of more

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than ordinary intelligence, and belong to one of the most influential Mexican families of the territory, and doubtless well understood the regulations concerning grants of the public domain.

The non-production of this record evidence of the title, under the circumstances, is calculated to excite well-grounded suspicions as to its validity, and throws upon the claimant the burden of producing the fullest proof of which the party is capable of the genuineness of the grant. We do not say that the absence of the record evidence is of itself necessarily fatal to the proof of the title; but it should be produced, or its absence accounted for to the satisfaction of the court.

We have already said, that the genuineness of the official signatures to the paper title might be established, and yet the title forged, and stated our reasons. Proof of the genuineness of these alone can never be regarded as satisfactory. It must be carried farther by the claimant. The record proof is generally *speaking, the highest. Possession and occupation of [*406] some duration, permanency, and value, are next entitled to weight.

At least, satisfactory evidence should be required, under the circumstances in which most of these Mexican grants were made, as to make the ante-dating of any given grant irreconcilable with the proof; otherwise, there can be no protection against imposition and fraud in these cases.

The decree of the court below reversed, and the case remanded for further evidence and examination.

THE UNITED STATES, Appellants, v. ANDRES PICO.

22 H. 406.

CALIFORNIA LAND GRANTS—ABSENCE OF RECORD EVIDENCE.

In the absence of any record evidence of the title, and of the usual preliminary petition, reference, and *informe*, the grant and all the other papers arising from the private possession of the claimant, held insufficient to establish the claim. The doctrine of the previous case applied to this.

APPEAL from the district court for the northern district of California. The case is very like the preceding one, is governed by the same principle, and is sufficiently stated in the opinion.

Mr. Black, attorney general, and *Mr. Stanton*, for appellants.

Mr. Gillet, for appellee.

The United States v. Vallejo.

[*415] *Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from a decree of the circuit court of the United States for the northern district of California.

The appellee presented to the board of commissioners a claim for eleven square leagues of land known by the name Moquelamos, situate in the county of Calaveras, California. The board rejected the claim; but, on appeal to the district court, and the production of some further proof, that court affirmed it.

The preliminary proceedings required by the regulations of 1828, before a grant of the public lands, were not produced, if any existed. The only evidence of the title is a grant of the tract by a formal title to the claimant, dated Los Angeles, 6th June, 1846, signed by the governor, Pio Pico, and J. M. Moreno, the secretary of state, and two other papers, relied on as furnishing proof that the grant was approved by the departmental assembly. One of them is a certificate to that effect of the governor and secretary, bearing date 15th June, 1846; the other purports to be a communication from N. Botello, deputy secretary of the departmental assembly, of the approval, to Moreno, secretary of state, for the information of the governor. This approval, according to the deputy secretary of the assembly, was in a session held on the 15th July, 1846. The paper was found among the Mexican archives.

[*416] *The other documents—the grant and certificate of approval—came from the hands of the claimant. No record of them was found among the Mexican archives or in any book, nor is there any evidence of possession or occupation deserving notice or consideration.

The case falls within the principles and is governed by the views of the court in the case of the United States v. Teschmaker and others, decided at this term. Besides the suspicious character of the grant, it appears to be wholly destitute of merit.

The decree below reversed, and the case remanded for further evidence. . .

THE UNITED STATES, Appellants, v. MARIANO G. VALLEJO.

22 H. 418.

CALIFORNIA LAND GRANTS—ABSENCE OF RECORD EVIDENCE.

In this case there is nothing to support it but the grant which comes from possession of the parties—no record evidence. This is insufficient, under the ruling of the previous cases.

Thompson v. Roe.

APPEAL from the district court for the northern district of California. The case is like the two preceding ones, and is ruled by them. It is sufficiently stated in the opinion.

Mr. Black, attorney general, and *Mr. Stanton*, for the United States.

Mr. Phillips, for the appellee.

* Mr. Justice NELSON delivered the opinion of the court. [* 421]

This is an appeal from a decree of the circuit court of the United States for the northern district of California.

The appellee, Vallejo, presented to the board of land commissioners a claim for three square leagues of land, known by the name of *Yulupa*, situate in the county of Sonoma, California, having derived his title from Miguel Alvarado, the original grantee.

The documentary evidence of the title is: 1st. A grant in due form, dated Monterey, 23d November, 1844, purporting to be signed by Micheltorena, governor, and Francisco Arce, secretary, with a memorandum by the secretary: "Note has been made of this title in the proper book;" and 2d. A certificate of approval by the departmental assembly, bearing date * at the city [* 422] of Los Angeles, 18th February, 1845, signed by Pio Pico, governor, and Jose M. Corvarubias, secretary.

Neither the grant nor the certificate of approval has been found among the Mexican archives, nor the record of them upon any book of records. Both papers came from the hands of the claimant. The genuineness of the title depends upon proof of the official signatures, and some evidence of possession.

The board rejected the claim; but on appeal to the district court, and the production of further proof of possession, that court affirmed it.

The case falls within the views of the court in the United States v. Teschmaker and others, decided this term.

Decree reversed, and the case remanded for further evidence.

EMMA B. C. THOMPSON and others, Plaintiffs in Error, v. RICHARD ROE, Lessee of Jane Carroll, and others.

22 H. 422.

TAX TITLE—EFFECT OF CITY ORDINANCES.

1. Upon the true construction of the charter of the city of Washington of 1820, as amended by the act of 1824, it is not a condition necessary to the validity of a sale

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of unimproved lots or lands for taxes that the personal estate of the owner, though living in Washington, should be previously exhausted.

2. Nor does the ordinance of the city directing the collecting officer to levy first on personal property, unless the owner otherwise consents in writing, affect the validity of the sale made without such consent, or such previous resort to personal property of the owner.

WRIT of error to the circuit court for the district of Columbia.
The case is well stated in the opinion.

Mr. Carlisle and Mr. Badger, for plaintiffs in error.

Mr. Brent, Mr. Tyler, Mr. Mackey, and Mr. Redin, for defendants.

[* 431] * Mr. Justice GRIER delivered the opinion of the court.

The lessors of the plaintiffs below claim to recover a lot of ground in the city of Washington, the title to which was admitted to have been in their ancestor in 1835. In that year it was sold for taxes by the corporate authorities. The plaintiffs in error claim through mesne conveyances of the tax title.

[* 432] * The lot in question was assessed as vacant and unimproved; but the owner, Mr. Carroll, resided in Washington city. He owned a large number of unimproved lots, the taxes on which amounted to \$5,690. He had personal property in and about his house, estimated at between five and six thousand dollars.

On the trial, but a single defect was alleged against the tax title, which raised the question, "Whether, upon the true construction of the charter of 1820, as amended by the act of 1824, it was a condition to the validity of the sale of unimproved lands for taxes, that the personal estate of the owner should have been previously exhausted by distress."

The court instructed the jury: "That if Carroll resided within the limits of the corporation of Washington, and had in his possession personal property sufficient to pay all taxes due by him, which might have been seized and subjected to distress and sale, it was the duty of the corporation, through their collector, to resort first to such personal property; which not being done, the sale of the lot in question was illegal and void."

The correctness of this instruction is the only question presented by the record for our consideration.

The authority granted to the city and the mode of its exercise is to be found in the 10th section of the act "to incorporate the city of Washington," passed on the 15th of May, 1820. It provides "that real property, whether improved or unimproved, on which two or more years' taxes shall have remained unpaid, may be sold

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at public sale, to satisfy the corporation therefor ;" with this proviso, that no sale "shall be made in pursuance of this section of any improved property, whereon there is personal property of sufficient value to pay the taxes," &c.

It is the obvious intent of this law, that the thing or property shall be held liable for the tax assessed upon it, and that the tax is a lien *in rem*, which may be sold to satisfy it. It seems to assume, also, that the property should be assessed to some person as owner, for it provides for a longer or shorter notice by advertisement, according to the residence of the owner, whether in or out of the District or of the United States. Where *the [* 433] owner is out of the jurisdiction of the corporation, the assessment can impose no personal liability on him. But where he resides in the city, he may be considered as personally liable for the taxes assessed against his property, and "charged to him ;" and though not liable to an action of debt, the 12th section of the act provides an additional remedy for the corporation. Besides that of proceeding *in rem*, under the provisions of the 10th section, it enacts that "that the person or persons appointed to collect any tax imposed by virtue of the powers granted by this act shall have authority to collect the same by distress and sale of the goods and chattels of the person chargeable therewith," &c.

That act of May 26th, 1824, which modifies and changes some of the provisions of this act, provides, among other things, "that no sale for taxes shall be void by reason of such property not being assessed or advertised in the name of the lawful owner."

Without inquiring whether this act repeals the 12th section of the previous act by implication, it shows plainly that the property assessed is considered as primarily liable for the tax, without regard to ownership. But assuming that the owner, residing in Washington, is still personally liable for taxes assessed on his unimproved lots, there is nothing to be found in this law that, by any fair construction, requires that the remedy against the person must be exhausted before that against the property charged with the tax can be resorted to. It is not necessary to the validity of the assessment and sale of the property taxed, that the name of the true owner be ascertained. The collector, therefore, cannot be bound to search for him, or to distrain the personal property of one who may or may not be the owner, even when named as such in his assessment list.

The remedy given by the twelfth section to the corporation is co-ordinate or cumulative, but is not imperative as a condition precedent to the exercise of the authority to sell the property assessed.

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It is a power conferred on the officer, to be used at his discretion—not a favor to the owner. If he is unable to pay the taxes [* 434] assessed on his property, it may not * be a very desirable measure for him to have his household furniture distrained and sold on ten days' notice, when the remedy against his land cannot be pursued till two years' taxes are due and unpaid; and the owner has then two years more to redeem his land after the sale. A construction of this act, which made it the imperative duty of the collector to distrain the personal property, might be ruinous to the proprietor, and deprive him of an important privilege.

The city of Washington was laid out on an immense scale. But a very small portion of the lots and squares were improved or productive. Their value to the owners was, in a great measure, prospective, while the present burden of taxes, to those who owned large numbers of them, was oppressive. As we see in the present case, if the collector had levied on the personal property of the owner for the taxes charged on his vacant and unproductive lots, it would have left him without furniture in his house, or servant to wait on him. Hence, a four years' delay was to him a valuable privilege. It demonstrates, too, the evident policy of the act of congress in not compelling a sale of the owner's personal property before the lands charged could be sold. In Georgetown and Alexandria, old-settled towns, where the lots were nearly all improved, and yielded profits to the owners, the statute adopted a different policy. By the proviso to the eighth section of the act of 1824, which applies exclusively to those towns, the collector is not permitted to sell real property where the owner charged with the tax has sufficient personal estate, out of which to enforce the collection of the debt due.

The case of *Mason v. Fearson* (9 How. 248) has been urged in the argument as an example of the construction of this statute, which should be followed in this case, and where the word *may* is construed to mean *must*. But that case has no analogy to the present. It is only where it is necessary to give effect to the clear policy and intention of the legislature, that such a liberty can be taken with the plain words of a statute. But there is nothing in the letter, spirit, or policy, of this act, which requires us to put a forced construction on its language, or interpolate a provision not to be found therein.

[* 435] * In this case, the owners of the tax title have had the possession, paid the taxes, built and made valuable improvements on the lot, in the presence of the former owners, for near twenty years. That which was of comparatively small value

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at first, now become valuable. Under such circumstances, a court of justice should be unwilling to exercise any judicial ingenuity to forfeit even a tax title, where the former owners have been so slow to question its validity.

The counsel for appellees have endeavored to support this instruction of the court, by a reference to certain ordinances of the corporation, which, among other things, direct the collector to levy first on the personal property of the person charged with the tax, unless such person shall give consent in writing to the contrary. This direction to the collector is a very proper one. It leaves the election of this remedy to the person charged, and not to the officer. But the power to sell the lands for taxes is to be found in the acts of congress, not in the ordinances of the corporation. They can neither increase nor vary it, nor impose any terms or conditions, (such as evidence of the owner's election,) which can affect the validity of a sale made within the authority conferred by the statute.

The purchaser of a tax title is not bound to inquire further than to know that the sale has been made according to the provisions of the statute which authorized it. The instructions or directions given by the corporation to their officers may be right and proper, and may justly be presumed to have been followed; but the observance or non-observance of them cannot have the effect of conditions to affect the validity of the title.

The question argued by the counsel of appellees, again bringing up the endless controversy as to the *terminus a quo*, in the computation of time, and which was noticed by this court in the case of *Griffith v. Bogert*, (18 How. 162,) is not in the case as presented by the record, and we cannot anticipate its decision.

Judgment reversed, and *venire de novo*.

HENRY DALTON, Appellant, v. THE UNITED STATES.

22 H. 436.

CALIFORNIA LAND GRANTS.

1. Where the petition, the *informe*, the grant of the governor, and approval of the departmental assembly are all regular, and accompanied by ten years' possession, these will be held, in the question whether the grantee was a foreigner, to outweigh a few loose expressions of the grantee in private conversation which look the other way.
2. This court does not now decide whether the fact that the grantee was a foreigner would defeat the claim.

APPEAL from the district court for the southern district of California. The case is sufficiently stated in the opinion.

Dalton v. The United States.

Mr. Brent, for appellant.

Mr. Black, attorney general, for appellee.

[* 439] * *Mr. Justice GRIER* delivered the opinion of the court.

The title of *Dalton* is found in the archives, and its authenticity is not disputed. The expediente exhibits:

1st. A petition of Henry Dalton, dated March 12th, 1845, at Los Angeles, setting forth that he is a resident of that city; that he is endeavoring to increase the number of cattle on the premises which he possessed, called Azusa, but that he lacked more land [* 440] for that purpose; that the mission of San Gabriel * owned a large plain adjoining his tract of Azusa, which was useless to them. It was accompanied with a *diseno* or map of the land. The quantity desired was two *sitios*.

On the 13th of March, Pio Pico, acting governor, makes the usual marginal order for information, referring the petition to Father Thomas Estinega, minister to the mission of San Gabriel, to report.

March 26th. Estinega reports, that the tract solicited is one of those which the mission cannot cultivate, because it is deficient in water; and considering that Dalton offers to deliver him, as a gift for the Indians, five hundred dollars, he consents that a grant of the land be made to Dalton.

This petition was referred also to the municipal counsel of Los Angeles, who reported in favor of the grant, and on the 14th of April certified their approval to the governor.

On the 26th of May, 1845, Governor Pico orders a grant to be made out for two *sitios*, and sent to the departmental assembly for their approval.

June 9th, 1845. The departmental assembly, upon report of the committee on waste lands, to whom the expediente had been referred, approve the grant as in conformity with the law of August 18th, 1824, and the regulations of 21st of November, 1828.

In pursuance of this grant, judicial possession was delivered to Dalton, February 14th, 1846, in due form, with a regular survey of the boundaries.

The only objection urged in this court to this title, as justifying its rejection, is, that Henry Dalton was a foreigner, and had not been naturalized, and was therefore incapable of taking a grant of land.

The counsel for the plaintiff in error deny both the law and the fact as assumed in this objection.

1st. They contend that it was no part of the policy of the Span-

ish or Mexican government to exclude foreigners from holding lands; that the colonization law of 1824 invites foreigners to "come and establish themselves within the Mexican territory, and gives them privileges against taxation," &c., &c.; and provides that, until after 1840, the general congress *shall [* 441] not prohibit any foreigner as a colonist, unless imperious circumstances should require it with respect to *individuals of a particular nation*.

2d. They contend, also, that the regulations of 1828 require the governor to obtain the necessary information as to whether the petitioner is a person within the conditions required to receive a grant; that the expediente found in the record shows a full compliance with the law; that the definite title, which is a valid patent, recites that the petitioner was "in the actual possession, by *just title*, of a rancho" known by the name of Azusa; that this is a legislative adjudication of the fact of the grantee's capacity to hold land, and *per se* a naturalization, if he had previously been an alien; that, at least, it affords a *prima facie* if not a conclusive presumption of the grantee's capacity to receive a further grant of lands.

3d. They contend, also, that any legislation repugnant to this policy of the government of Mexico since that time originated in, perhaps, a just jealousy of their American neighbors, and was aimed wholly at them, and intended to apply only to the colonies bounding on the United States; that this is apparent from the edict of Santa Anna of 1842, which permits foreigners not citizens, residing in the republic, to acquire and hold lands, and excepts only the departments "*upon the frontier and bordering upon other nations*;" that California was never treated as within this category, as the colonized and settled portion of it is separated a thousand miles from the frontier or border of any nation, and was at that time almost a *terra-incognita* to the rest of the world.

4th. They contend that, by the Spanish as well as by the common law, a foreigner is not incapable of taking a grant of land, but holds it subject to be denounced in the one case, and forfeited by an inquest of escheat in the other; that the grant in this case being complete, neither the United States land commissioners, nor the courts authorized to adjudicate the Mexican title under the treaty, can exercise the functions either of denouncers or escheators.

5th and lastly. It is contended, that even if the court considered itself bound to declare this grant void by reason *of the alleged incapacity of the grantee to take or hold, [* 442] yet that there is no sufficient evidence to establish the fact

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of alienage against the strong presumption of the contrary, arising from the face of the expediente and definite title.

The court do not intend to express any opinion upon the first four of these propositions, as the last suggests a sufficient reason for the confirmation of this grant.

In all cases, the testimony of admissions or loose conversations should be cautiously received, if received at all. They are incapable of contradiction. They are seldom anything more than the vague impressions of a witness of what he thinks he has heard another say—stated in his own language, without the qualifications or restrictions, the tone, manner, or circumstances, which attended their original expressions. If a complete record title with ten years' possession could be divested by such testimony, its tenure would be very precarious, especially where the owner is surrounded by a population of settlers interested in defeating it. All the evidence on the record on the subject of alienage, besides that of a brother who proved *himself* an alien, is in the deposition of two witnesses. One states that Dalton, in *order to avoid serving as a jurymen*, said "he did not claim to be an American or Mexican citizen." He might well have been a citizen, although he was not desirous of setting up such a claim on that occasion. The other states that in 1847, during the war, when the country was occupied by the American forces, he said "he was not a Mexican, and never intended to become an American citizen." At such a time, he may have had many motives prompting him to make such a representation. The Mexican government had ceased to protect him, and the treaty of Guadalupe Hidalgo had not then made him an American citizen.

Now, assuming that these witnesses have remembered and reported the precise words used by the claimant in these loose conversations, they contain no positive assertion that he had never been naturalized, or was born out of Mexico. Such testimony ought not to be received to outweigh the *prima facie* (if not conclusive) presumptions arising from the expediente and definite title.

[* 443] *In this respect, this case closely resembles the case of *United States v Reading*. (18 How. 1.)

The decree of the district court is reversed, and the title of the claimant to the land in question is hereby confirmed.

JOSE MARIA FUENTES, Appellant, v. THE UNITED STATES.

22 H. 443.

CALIFORNIA LAND GRANTS.

1. Where the case stands exclusively upon the paper in possession of claimant purporting to be a grant, with no petition, no *informe*, no reference for such, no order of survey or possession, no approval of the departmental assembly, and doubtful evidence of the genuineness of the governor's signature, the claim will be rejected.
2. The case is fatally defective, even if the signature be genuine, for want of performance of the conditions of the grant, as it amounts, in this case, to evidence that the claim had been abandoned before the title passed to the United States.

APPEAL from the district court for the northern district of California. The case is sufficiently stated in the opinion.

Mr. Blair and *Mr. Crockett*, for appellant.

Mr. Black, attorney general, for appellee.

* Mr. Justice WAYNE delivered the opinion of the court. [* 450]

The appellant has come to this court asking for a confirmation of his claim to eleven leagues of land, called Potrero. The paper under which he claims the lands purports to be a grant from Governor Micheltorena. It recites that the land is within the ex-mission of San José, bounded on the north by the locality called the Warm Springs, on the south by Palos, on the west by the peak of the hill of the ranchos Tulgencio Higuera and Chrysostom Galenda, and on the east by the adjoining mountains. It also recites that the governor had taken all the necessary steps and precautionary proofs which were required by the Mexican laws and regulations for granting lands, and that he had granted the land upon the following conditions to the appellant:

1. That he should enclose it without prejudice to the cross-ways roads, and uses; that he shall have the exclusive enjoyment of it, and apply it to such use and culture as may best suit his views.

2. That he should apply to the proper judge for judicial possession of the same, by whom the boundaries shall be marked out, and along which landmarks should be placed to designate its limits, and that fruit and forest trees shall be planted on the land.

3. That the land given should contain eleven leagues for large cattle, as is designated by a map said to be attached to the expediente. The land is to be surveyed according to the ordinance; and should there be an overplus, it was to inure to the benefit of the nation.

* The title is to be recorded in the proper book, and [* 451]

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then to be delivered to the petitioner for the land, for his security. This paper bears date the 12th June, 1843, and has the name of Micheltorena to it, which is denied to be his signature.

The first inquiry, then, concerning it, should be into its genuineness: Was it executed by Governor Micheltorena? Has the party claiming proved it?

The testimony introduced in support of the genuineness of the paper is to be found in the depositions of Zamon De Zaldo, Jose Abrego, Manuel Castro, and Joseph L. Folsom. Zaldo declares himself to be chief clerk and interpreter to arrange and classify the Spanish and Mexican archives in the custody of the surveyor general of California. He was not interrogated as to the signature to the paper, and says nothing about its having been executed by Micheltorena. He was asked what he knew of the book of land titles of the Mexican government for the year 1843. He answers that he knew that a book for the year 1843 was not in the office, though he did not know of his own personal knowledge that such a book ever existed, and that all that he did know about it had been learned from a correspondence in the office, that such a book belonging to the archives had been in the possession of J. L. Folsom, United States quartermaster at the time, and that he had learned, in the same way, that it was destroyed with Folsom's papers by the fire in San Francisco of 1851. Folsom states that a book of records, containing grants of land in Upper California, had been put into his possession in the spring of 1851, to be used as evidence in the suit of Leese & Vallejo v. Clark, then pending in the superior court of the city of San Francisco. It was in the Spanish language, and came from the archives of the Mexican government of California, then in the possession of the commanding general at Benicia, and was delivered to him as an officer of the army, for safe keeping. He adds: after the book was used as evidence, it was returned to me, and was deposited in my office in the city of San Francisco; and whilst there, the great fire of the 3d and 4th May, 1851, occurred, by which my office and its contents, including the said [* 452] book, were destroyed. And he then concludes * his deposition, saying: "*I am not positive as to the date of the grants contained in the said book, but from my best recollection, my impression is that they were for the years 1843 and 1844.*" The purpose for which Zaldo and Folsom were made witnesses for the claimant was to connect the book which Zaldo said was not among the archives with the book which Folsom said had been burned, that it might be inferred, from the date of the paper upon which Fuentes rests his claim, that it had been recorded in that book.

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It is stated in the petition that the grant was issued and delivered in due form of law on the 12th June, 1843; that it was recorded at the time it was issued; that it was not to be found in the archives; and that he believes that the copy of the grant was burned, and on that account could not be produced. It is further stated, that the grant had been approved by the territorial legislature, and was in all respects formally completed according to law, but that the records of the legislature for the year 1843, were in like manner destroyed by fire at the same time with the record of the grant, and that the claimant could not produce any evidence of the approval of the grant by the legislature. In this recital from the petition we find a very exact anticipation of what the evidence ought to be, to prove that such a grant had been issued, and that it had been duly recorded, but none such was introduced. Zaldo believes, from a correspondence in the office, that a book belonging to it had been burned while it had been in the safe keeping of Folsom. Folsom says a book from the archives was burned, but that he cannot be positive as to the date of the grant in it, but that from his best recollection his impression was, the grants in it were for the years 1843 and 1844; and Zaldo declares that he had no personal knowledge that such a book ever existed, but adds, that there is wanting in the office a book for the year 1843. This falls short of the evidence which was necessary to connect the alleged grant with the archives of the office. There is no other evidence in the record to supply such deficiency. And it is admitted now that the paper was never sent to the departmental assembly.

In truth, between that burned book and the Fuentes paper, * the testimony in the record makes no connection [* 453] whatever. The mere declaration that it was dated in 1843 cannot do so. Nor can any implication of the kind be raised from the testimony of Abrego and Castro. Neither of these witnesses were interrogated concerning the burned book, nor was any attempt made to prove that any of the records of the departmental assembly, *especially its approval of this grant*, had been burned at the same time. What has been said of the insufficiency of the evidence to prove the record of the paper applies with equal force to the certificate which is alleged to have been given by Jimeno, that the paper set out in the petition as a grant had been recorded in the proper book, which is used in the archives of the secretary's office.

The case, then, stands altogether disconnected from the archives, and exclusively upon the paper in the possession of Fuentes. It has no connection with the preliminary steps required by the act of Mexico of the 18th August, 1824, or with the regulations of

November 28, 1828. It is deficient in every particular—unlike every other case which has been brought to this court from California. There was no petition for the land; no examination into its condition, whether grantable or otherwise; none into the character and national status of the applicant to receive a grant of land; no order for a survey of it; no reference of any petition for it to any magistrate or other officer, for a report upon the case; no transmission of the grant—supposing it to be such—to the departmental assembly or territorial legislature, for its acquiescence; nor was an expediente on file in relation to it, according to the usage in such cases.

All of the foregoing were customary requirements for granting lands. Where they had not been complied with, the title was not deemed to be complete for registration in the archives, nor in a condition to be sent to the departmental assembly, for its action upon the grant. The governor could not dispense with them with official propriety; nor shall it be presumed that he has done so, because there may be, in a paper said to be a grant, a declaration [* 454] that they had been observed, *particularly in a case where the archives do not show any record of such a grant.

The act of 1824 and the regulations of 1828 are limitations upon the power of the governor to make grants of land. They are, and were also considered to be, directions to petitioners for land, before they could get titles. Where the petition and the other requirements following it have not been registered in the proper office with the grant itself, a presumption arises against its genuineness, making it a proper subject of inquiry before that fact can be admitted. It is not to be taken as a matter of course; nor should slight testimony be allowed to remove the presumption. Both the kind and quantum of evidence must be regarded. We proceed to state what they are in the record.

None can be found to establish with a reasonable probability the genuineness of the paper upon which the claimant relies. The only testimony bearing upon the genuineness of the paper is that of Abrego and Castro. Both speak of the signature of Micheltorena, and no further. Abrego says that he knew the governor; that he had frequently seen him write, and that he had examined the signature to the document presented to him, and that he knows it to be the signature of Governor Micheltorena.

Castro is more particular, but not so positive; and he gives a narrative of the origin of the paper, which is certainly peculiar, and from which a reasonable suspicion may be indulged against

his disinterestedness. He says: "An instrument in writing is now shown to me, purporting to be a grant to Jose Maria Fuentes, dated June 12, 1843, and it is attached to the deposition of Jose Abrego, heretofore taken in this case, and marked H. J. T., No. 1. I know the paper; it is in my handwriting. I was at the time secretary in the prefect's office in Monterey, and being on terms of friendship with Secretary Jimeno and Mr. Arce, a clerk in his office, I frequently assisted them in their official duties, at their request, and in that manuer I wrote the body of this grant. It was written in June, 1843, at the time of its date. I know the signature of Micheltorena; and the signature purporting to be his *appears *like his; and the signature of Jimeno on said [* 455] paper also appears like his.*" The words of the witness have been given.

The signature of Jimeno, of which Castro speaks, purports to be a certificate from Jimeno that the grant had been recorded, the day after its date, in the proper book of the archives of the secretary's department. It is upon the same paper with the title, and purports to have been put upon it by the order of the governor, "that the title might be delivered to the party interested, for his security and ulterior ends."

Abrego, in a second deposition, says he knew Fuentes and his family, and that he was not of age, but was a minor, on the 7th July, 1846—more than three years after the date of the grant.

Such is all the testimony in this record to prove the genuineness of the signature of Micheltorena, unless it be the notarial certificate, given under the seal of the national college in the city of Mexico; which, as it is presented in this case, is not evidence, and of no account at all.

We will now show that the testimony of Abrego to the signature of Micheltorena is insufficient to establish that fact, and that Castro's deposition gives to it no aid. In truth, the whole case has no other evidence in support of the genuineness of the signature of the governor than what Abrego has said. In showing this, we shall have no occasion to impeach his character as a man, or his truthfulness as a witness, as there is nothing in this record, whatever there may be in others, to justify such an attack. The case must be decided upon what its own record contains, and upon nothing else.

Abrego's deposition has not that foundation which the rules of evidence require a witness to have, to enable him to prove the genuineness of an official signature to a public document, or a signature to a private writing. The document in this instance purports

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to be genuine; but whether so or not, it discloses the fact that there is upon it an official witness of its execution and record, who should have been called to prove it, if he was living, and if absent beyond the jurisdiction of the court, whose signature should have been proved by a witness who was familiar with his signature [* 456] and handwriting, before * secondary evidence could be received of his own signature, or that of the official who is said to have executed the paper.

It was the duty of Jimeno to record all grants which were made by the governor, and to give attestations to that fact, and which it is said Jimeno did give to the paper in this instance. Why was not Jimeno called? It seems that he was overlooked or not thought of.

The simplest and best proof of handwriting is the testimony of one who saw the signature actually written; and inferior evidence as to his handwriting is not competent, until it has been shown that his testimony to the execution of the paper could not have been procured. And when a document, either public or private, is without a witness, the best evidence to disprove the signature, and to prove it forged, is the testimony of the supposed writer, if he be not incompetent from interest, and can be produced. In the latter case, the next best evidence is the information of persons who have seen him write, or been in correspondence with him.

Such, however, is not this case, though it was acted upon in the court below as if it was so.

Abrego here, then, is in the attitude of an incompetent witness, who was called and permitted to testify before the party by whom he was introduced, had laid a foundation for the next best evidence, when the paper submitted to him showed the fact that the better could have been had, either primarily or secondarily, in the manner we have already indicated. Abrego swears that he knew Micheltorena; that he had frequently seen him write; that he had examined the signature to the document presented to him, and that he knew it to be the signature of Governor Micheltorena. But had Secretary Jimeno been called as a witness, as it was his official duty to test the signature of the governor to grants, his would have been the best testimony to prove its genuineness in this instance, and that the grant had been transferred to him officially, for delivery to the grantee.

Castro's deposition is in the same predicament with that of Abrego, but with an aggravation of its insufficiency to prove the signature of Micheltorena, and of his incompetency as a [* 457] * witness. He was not asked if he knew Micheltorena, or was familiar with his handwriting or with his signature,

or if he had ever seen him write. He only says: I know the signature of Micheltorena, and the signature to the paper appears like his, and the signature of Jimeno appears like his. He does not say how he had become qualified, by comparison or otherwise, to swear to the signature of Micheltorena; and notwithstanding his declared friendship with Jimeno—so much so, that he was frequently asked to assist him in the duties of his office, and particularly asked to write out in his own hand the paper in question—he has left it to be inferred that he only knew enough of Jimeno's handwriting to enable him to say that the signature to the grant which he wrote out in his own hand appears like Jimeno's signature.

If such was the way of doing business in the secretary's office, which we have no cause for believing, it must have been an easy matter to get from it such a paper as that now in question, and not at all difficult to have been accomplished by one who had such familiar access to the office as Castro represents himself to have had, especially if all of the prerequisites of a grant enjoined by the act of 1824 and the regulations of 1828 were allowed to be disregarded.

This narrative of De Castro, instead of bringing the mind to any conclusion in favor of the genuineness of the signatures of Micheltorena and Jimeno, rather suggests caution in receiving it, and that it ought to be corroborated by other witnesses before that shall be done. It seems to us, too, somewhat remarkable that this witness, familiar as he was with the origin and object of this paper prepared by himself, should not have been questioned concerning its delivery to Fuentes, then a minor, to whom it was delivered for him, or what was done with it at the time of its date; or in whose possession it was from that time until it was presented to the land commissioners for confirmation, in 1852.

There is entire absence of all proof of its having been delivered to Fuentes himself, or to any one for him; but it seems to have found its way to the city of Mexico, as the record shows, and reappears in California years after its cession to * the United [* 458] States, and more than eight years after it is said to have been executed. The assertion in the paper itself, that the governor had directed it to be delivered, can be no proof of that fact, until its genuineness shall have been ascertained. If the minority, too, of Fuentes is considered, in connection with the conditions upon which this grant is said to have been made, it may well be inferred that it was not delivered to the grantee, as he was not then in a situation to carry out the conditions of the grant, without the intervention of a tutor or guardian, and nothing was done to perform those conditions at any time afterward.

We do not speak now of such non-performance as a cause sufficient for denying a right claimed under a genuine grant; but only as a fact in this case accounting for the non-performance of the conditions of the grant, and making it probable that Fuentes did not receive this paper until some time after its date from Micheltorena, and not until after the cession of California to the United States. A delivery after the latter event, by a former governor of California, would not give a grantee a right to claim the land by any obligation imposed upon the United States by the treaty of Guadalupe Hidalgo.

We have given to this case a very careful examination, and have concluded that no evidence can be found on its record to sustain the genuineness of the paper under which the land is claimed. That there is none to prove its registry in the archives of the secretary's office, at the time of its date or afterwards. That no reliable proof has been given to connect it with the book of records, which had been committed to the care of the witness, Folsom, and was burned in his office. That it does not appear that any one of the precautionary requirements, before a grant of land could be made by a governor of California, had been complied with in this case. That there is no proof whatever that such a paper as that in question had been delivered to the claimant at any time before the power of Mexico in California had ceased; and it was admitted, in the argument of the case here, that no such paper had been sent to the departmental assembly for its acquiescence, as a grant from the governor.

[* 459] *It was, however, urged in the argument, that such prerequisites for a grant of land should be assumed to have been observed, on account of a recital in the paper or grant that they had been. Several cases from the reports of this court were cited, being supposed by counsel to support the position. None of them do so. We have not been able to find a case reported from this court, either under the Louisiana or Florida cession, that does. Peralta's case, in 19 Howard, 343, does not do so. The decision there is, that when a claimant of land in California produced documentary evidence in his favor, *copied from the archives in the office of the surveyor general*, and other original grants by Spanish officers, the presumption is in favor of the power of those officers to make the grants. There, the authenticity of the documents was admitted, and the validity of the petitioner's title was not denied, on the ground of any want of authority of the officers who made the grant. This court then said, that the public acts of public officers, importing to be exercised in an official capacity and by public authority,

shall not be presumed to be usurped, but that a legitimate authority had been previously given or subsequently ratified.

In the case of *Minturn et al. v. Crommelin*, 18 Howard, 88, it was ruled that when a patent for land has been issued by the officers of the United States, the presumption is in favor of its validity, and passes the legal title, but that it might be rebutted by proof that the officers had no authority to issue it, on account of the land not being subject to entry and grant. In *Delassus's case*, 9 Peters, 117, 133, the inquiry was, whether the concession was legally made by the proper authority; but the concession being in regular form, carried *prima facie* evidence that it was within the power of the officer to make it, and that no excess or departure from instructions should be presumed, and that he who alleges that an officer intrusted with an important duty has violated it, must show it. But there was no question in that case about the genuineness of the concession. That was admitted. The genuineness of the grant in *Arredondo's case*, 9 Peters, was not questioned. Nor was the genuineness of the patent in *Bagnel's case*, 13 Peters, *437, a subject of controversy. This court ruled [*460] in that case, that a patent for land from the United States was conclusive in an action at law, and that those who claim against it must do so on the equity side of the court. It is not, however, to be supposed that no title in California can be valid, which has not all of the preliminary requirements of the act of the Mexican congress of 1824, and of the regulations of 1828. But if none of them are to be found in the archives, and it cannot be established by the proof that they were registered there, this court will not presume that they were preliminary to a grant, because the governor recites in the grant that they had been observed. In what we have said upon this point, we are re-affirming this court's opinion in *Cambuston's case*, 20 Howard, 59. And we now take this occasion to repeat, that when it shall appear that none of the preliminary steps for granting land in California have been taken, this court will not confirm such a claim. For the reasons already given, we shall affirm the decree of the district court in this case.

But we also concur with that court in its rejection of this claim, supposing it to be genuine, upon the ground that there was no proof of a survey or measurement of this land, or any performance of its conditions, from which it may be inferred that the grantee had abandoned his claim. It is said that these were conditions subsequent, the non-performance of which do not necessarily avoid the grant. This is the case as to some of them; but even as to such, when a grantee allows years to pass after the date of his grant

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without any attempt to perform them, and without any explanation for not having done so, and then for the first time claims the land, after it had passed by treaty from the national jurisdiction which granted it, to the United States, such a delay is unreasonable, and amounts to evidence that the claim to the land has been abandoned, and that a party under such circumstances, seeking to resume his ownership, is actuated by some consideration or expectation of advantage, unconnected with the conditions of the grant, which he had not in view when he petitioned for the land, and when it was granted. The language just used was suggested in the Fremont case. The occasion has arisen in this case, when it becomes necessary to affirm it as a rule, to guide us in all other cases hereafter which may be circumstanced as this is.

The decree of the district court in this case is affirmed.

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THE NEW YORK AND BALTIMORE TRANSPORTATION COMPANY, Appellants, v. THE PHILADELPHIA AND SAVANNAH STEAM NAVIGATION COMPANY.

22 H. 461.

ADMIRALTY—COLLISION.

1. In a case of collision between a steamship and a propeller, with a barge in tow, the latter is not to be treated or to govern herself as a sailing vessel under similar circumstances.
2. She is bound by the rule that two steam vessels approaching each other in opposite directions must each port helm and go to the right.
3. A look-out, standing behind the wheel-house, so that it obstructs his view forward, is not in his proper place. The owner of the barge sunk by the collision cannot recover on account of a violation of these rules by the propeller.

APPEAL from the circuit court for the eastern district of Pennsylvania. The case is very fully stated in the opinion.

Mr. Wharton and *Mr. Schley*, for appellants.

Mr. McCall and *Mr. Campbell*, for appellees.

[* 468] * Mr. Justice CLIFFORD delivered the opinion of the court.

This is an appeal from a decree of the circuit court of the United States for the eastern district of Pennsylvania, in a cause of collision, civil and maritime.

New York and Balt. Transportation Co. v. Phila. and Savannah Steam Navigation Co.

It was a suit *in rem* against the steamship the Keystone State, brought by the appellants as the owners of the barge known as the A. Groves, jun., to recover damages on account of a collision which took place on the eighteenth day of August, 1857, between the steamer and the barge on the river Delaware, whereby the barge was sunk in the river, and her cargo was greatly damaged.

At the time of the disaster the barge was in tow of a propeller, called the Artisan, which was also owned by the appellants, and to which the barge was attached by a hawser, about one hundred and seventy feet in length. It occurred between one and two o'clock in the morning, about twenty miles below the city of Philadelphia, to which port the steamer was bound on her return trip from Savannah, in the State of Georgia.

According to the case made in the libel, the propeller, with * the barge in tow, was on her way from the city of [* 469] New York to the city of Baltimore, with her usual complement of freight. She was proceeding down the river, on the eastern side of the channel, and the steamer was coming up the river, on the opposite side of the channel, with ample room to have kept clear of the barge.

To show that neither the propeller nor the barge was in fault, it is alleged by the libelants that both those vessels had proper lights, and that the propeller had sufficient look-outs properly stationed on the vessel, and that they were vigilantly employed in the performance of their duties. They also allege that the steamer, when about three-quarters of a mile distant from the propeller, changed her course more out into the stream of the river, heading diagonally across the channel, in the direction of the descending vessels, and ran with great force and violence against the barge, striking her on the starboard side, near the after gangway, and cutting her down to such an extent that she immediately sunk in the river. In this connection they also allege that the barge, at the time of the collision, was laden with a cargo of merchandise, valued at seventy thousand dollars, and that the goods were damaged by the disaster to an amount equal to half their estimated value.

It is denied by the respondents that the circumstances attending the collision are truly stated in the libel. On the contrary, they aver that it was occasioned wholly through the fault and gross negligence of those in charge of the descending vessels. To lay the foundation for that theory, they allege that while the steamer was proceeding up the river at mid-channel, in the regular course of her voyage, and when about four miles below Marcus Hook, the second mate, pilot, and look-out of the steamer, discovered lights

directly ahead, which appeared to be about three miles distant; that the steamer continued her course up the channel, keeping the lights on her larboard bow, but as near ahead as was practicable; that after continuing that course for some time, and when about a mile distant from the lights, they were found to be the lights of [* 470] the propeller, and appeared to be at mid-channel. *Orders were then given by the pilot of the steamer to port her helm, so as to bring the lights of the propeller a point on the larboard bow of the steamer; and the order was forthwith obeyed. At that time the steamer, as alleged in the answer, was heading northeast by east; and she continued on that course, keeping the lights of the propeller one point on her larboard bow, until she approached within three hundred yards of the lights, when the propeller suddenly starboarded her helm, and attempted to cross the bows of the steamer. On seeing the propeller change her course in that direction, the pilot of the steamer gave the signal to slow and stop in immediate succession, and the orders, as alleged, were promptly obeyed. Those orders were so far carried into effect that the propeller passed on her course without injury; but the barge was dragged by the hawser directly against the bows of the steamer, and thereby received the damage, as alleged in the libel.

Such is the substance of the pleadings, respecting the circumstances attending the collision, so far as it is necessary to examine them at the present time.

After the hearing in the district court, a decree was entered for the respondents, dismissing the libel; and on appeal to the circuit court, that decree was affirmed—whereupon the libelants appealed to this court.

As appears by the proofs, the steamer, at the time of the collision, was well manned and equipped, and was in charge of a branch pilot, fully qualified to conduct and manage steam vessels on that river. She was a side-wheel steamer, of fifteen hundred tons burden, engaged in carrying freight and passengers, and had proper lights and sufficient and vigilant look-outs. They discovered the lights of the propeller when she was three miles distant, and continued to watch the lights till the collision occurred. On the other hand, the propeller was a vessel of one hundred and twenty-two tons burden, and the tonnage of the barge was about the same.

Three men, the master, the wheelsman, and one of the watchmen, were on the deck of the propeller at the time of the collision. All of the other hands, including the pilot, were below. Of [* 471] those on deck, the master was standing forward * of the pilot-house, but the watchman was standing aft the house,

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which he admits was higher than his head, so that he could not see over it. His position for a look-out was clearly an improper one, as the view forward was entirely obstructed by the house of the vessel. *Chamberlain and al. v. Ward and al.* 21 How. 570. Look-outs stationed in positions where the view forward, or on the side of the vessel to which they are assigned, is obstructed by the lights or any part of the vessel, do not constitute a compliance with the requirement of the law.

To constitute such a compliance, they must be persons of suitable experience, properly stationed on the vessel, and actively and vigilantly employed in the performance of that duty.

In this case, however, it appears that the steamer was actually seen by the master, who was in charge of the deck, in season to have adopted every necessary precaution to have avoided the disaster, but he admits that he did not pay much attention to the approaching vessel. When he first saw her, he says she was proceeding right up the river, but adds, that in the course of five minutes she changed her course, and ran from the western towards the eastern shore, which is the theory set up in the libel. According to the evidence, the speed of the steamer was nine or ten miles an hour, and that of the propeller was seven or eight miles an hour, with an ebb tide. At the place where the collision occurred, the channel of the river is about three-fourths of a mile wide, and the evidence shows that there is a cove or bend in the river below, so that a vessel coming up the river in the night-time would appear to an inattentive or casual observer, standing on the deck of a descending vessel, as being near the western shore, when in point of fact she was at mid-channel. Witnesses on both sides were examined as to the character of the night, and they generally agree, that while it was somewhat cloudy, there were intervening stars, and that it was not unusually dark.

Two propositions were chiefly relied on by the libelants. In the first place it was insisted in their behalf, that the propeller, with the barge in tow, ought to be regarded in the * same [* 472] light as a sailing vessel, and that it was the duty of the steamer to keep out of the way. No authority was cited in support of the proposition, and we are not aware of any decided case that favors that view of the law. Steamers are required to keep out of the way of sailing vessels, upon the ground that their power and speed are far greater than vessels of the latter class, and because those in charge of them can more readily and effectually command and appropriate that power and speed so as to avoid a collision, when it would be impossible for the sailing vessel to keep out of

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the way. *St. John v. Paine*, 10 How. 583. *The Genessee Chief*, 12 How. 463; *Steamship Co. v. Rumball*, 21 How. 384. None of the reasons on which the rule is founded, as applied to sailing vessels, exist in a case like the present. Propellers have nearly the same speed as side-wheel steamers, and quite as much power. Whether they obey the helm as readily or not, may admit of a question, but there is not sufficient difference in that behalf to justify any discrimination whatever in the application of the rules of navigation. If they take other craft in tow, those in charge of them ought to augment their vigilance in proportion to the embarrassments they have to encounter, especially when they do not see fit to slacken their speed.

It is insisted, in the second place, that the collision was occasioned through the fault of the steamer; that she changed her course and attempted to pass the bows of the propeller, as is alleged in the libel.

On the part of the respondents, this proposition of facts is denied, and they insist that the fault was committed by the propeller, in omitting to port her helm and go to the right. Beyond question, the law is well settled that steamers approaching each other from opposite directions are respectively bound to port their helms and pass each other on the larboard side.

No attempt was made at the argument to controvert the proposition, and it is too firmly established by decided cases to require any argument in its support. *The Duke of Sussex*, 1 Wm. Rob. 285; *The Gazelle*, 1 Wm. Rob. 471; *The James Watt*, 2 Wm. Rob. 271; *St. John v. Paine*, 10 How. 558; *The Oregon v.*

[* 473] *Rocca*, 18 How. 572; *Wheeler v. The * Eastern State*, 2 Cur. C. C. 142. Much testimony was introduced on the one side and the other upon this point, and it is somewhat conflicting. All that can be done under the circumstances with any possible advantage to either party will be to state our conclusions upon the evidence. After a careful examination of the depositions, we think it is clearly proved that both vessels as they approached each other were near mid-channel. Most of the witnesses on board the steamer expressly affirm that she was near mid-channel when the lights of the propeller were first discovered, and they all agree that her helm was not changed, except for the purpose of bringing the lights of the propeller one point on her larboard bow, until the propeller starboarded her helm, and attempted to cross the bows of the steamer. That movement of the propeller was a direct violation of the rules of navigation, and was entirely without any excuse. Her master may have been deceived as to the course of the

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steamer, by the slight bend in the river; but if so, it is the misfortune of those who employed him that he was not better acquainted with the navigation, or more attentive to his duty.

The decree of the circuit court is therefore affirmed with costs.

MARY F. ADAMS, Administratrix and Appellant, v. JOHN S. PRESTON
AND WIFE.

22 H. 473.

PROBATE PROCEEDINGS IN STATE COURTS HELD CONCLUSIVE IN FEDERAL COURTS.

1. Where the estate of an insolvent decedent in Louisiana was settled and wound up by syndics whose acts were approved by the creditors and homologated by the proper probate court, the proceedings are conclusive, in the absence of fraud, on all who took part in them.
2. In a subsequent suit brought in the circuit court of the United States by an assignee of one of the parties to that proceeding, the purchaser of property of the deceased under those proceedings will be protected, in the absence of fraud, though there may have been irregularities not affecting the jurisdiction in the probate proceedings.

APPEAL from the circuit court for the eastern district of Louisiana.
The case is fully stated in the opinion.

Mr. Taylor and *Mr. Steele*, for appellant.

Mr Benjamin, for appellees.

* Mr. Justice WAYNE delivered the opinion of the court. [* 480]

We have given our best consideration to this record, in connection with the minute statement made from it by the counsel of the complainant, without having been able to find any cause for the reversal of the judgment.

The plaintiff sued the defendants, John S. Preston and * Caroline M. Preston, his wife, as the joint possessors of [* 481] one hundred and thirteen negroes, and their increase, to subject them, and the revenues which had been derived from their labor, to the payment of certain judgments which the plaintiff says he owns, as the assignee of the Union Bank of Louisiana.

Those judgments had been obtained by that bank against Thomas Barrett, a resident of the city of New Orleans. He alleges that Barrett was the owner of the slaves when the judgments were obtained, and that, by reason of that fact, and the bank's assignment to him, he had a judicial mortgage upon them, their increase and revenues, to pay the judgments.

The suit was brought in the third district court of New Orleans.

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when the defendants were sojourners there; and being cited to answer, they appeared. Being citizens of the State of South Carolina, they removed the cause to the United States circuit court for the eastern district of Louisiana, in which it was filed on the chancery side of the docket. There the defendants filed a dilatory exception, in bar of the action against them; which being overruled, they were required to answer. And they did so.

They neither admit nor deny the original validity of the judgments against Barrett, nor the assignment of them to the plaintiff; and they admit that the one hundred and thirteen slaves had belonged to Barrett; but giving at the same time their narrative of the manner in which Barrett had acquired title to them, and the judicial proceedings under which they bought the property. They state, in their answer, that Wade Hampton, of South Carolina, being the owner of Whitehall plantation, in the parish of St. James, in Louisiana, sold it on the 8th April, 1829, to Leroy Pope, for \$100,000, payable in twenty years from the first day of January, 1830, with interest at six per cent. per annum, payable annually. That the seller took from Pope a mortgage on the plantation, and also an obligation that he would add to the plantation seventy working hands, and mortgage them to Hampton, with their increase, to secure the payment of Pope's purchase and interest. Pope, on the 23d of February following, complied with his obligation, [*482] by mortgaging seventy working hands and *thirty-one children to Hampton. He was then a resident of the parish of St. James.

Pope, two years afterwards, on the 18th March, 1833, sold the plantation and slaves to Thomas Barrett, of New Orleans, for \$151,034. In payment, Barrett assumed to pay the debt of \$100,000, and the accruing interest annually, to Hampton, and received the property, subject to the rights of Hampton upon the plantation and slaves. Two days afterwards, Barrett conveyed one-half of his purchase to Robert Bell, with an agreement that Bell's interest should be considered as having attached from the day of Barrett's purchase. Barrett failed to pay the interest; and Hampton being dead, his heirs brought suits for it, and these judgments were obtained against him in January, 1838, March, 1839, and April, 1839. The judgments were recorded in New Orleans, where Barrett lived; but the mortgages and conveyances given to Hampton, and his conveyance of the plantation, were recorded, when they were executed, in the parish of St. James, where the slaves were, and where Pope and Bell both lived.

Barrett became embarrassed, and applied for the benefit of the

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insolvent laws of Louisiana, on the 12th May, 1840. In the schedule of property surrendered to his creditors is found an item of Whitehall plantation and one hundred and fifty slaves, valued at \$210,000, subject to the bond for \$100,000, and the interest due thereon.

A meeting of Barrett's creditors was held on the 15th June, 1840. Syndics were elected by them, with general discretionary powers, *particularly with the power to sue for the partition of any property whatsoever held and owned by the insolvent jointly with others, and to claim partition in kind or by sale*; also, to appoint agents for the disposal of property out of New Orleans. Amongst the creditors at this meeting who elected the syndics was the Bank of Louisiana, by its representative, its president. In October, after this meeting of the creditors, the heirs of Hampton intervened in the insolvent proceedings, claimed their rights under the mortgages upon Whitehall and upon the negroes; and they took a rule upon Magoffin and Morgan, the syndics of the creditors, to show cause why the *plantation and negroes should not [* 483] be sold, and the proceeds applied to the payment of their claim. The rule was made absolute, by a judgment recognizing their right as mortgagees, and ordering a sale of the property.

At a subsequent meeting of the creditors, at which the Union Bank of Louisiana was again represented by its president, the creditors gave to the syndics a power to raise all mortgages recorded against the insolvent on any estate owned by him alone, or jointly with other persons, which had been surrendered to his creditors, *with authority* to make partition of the same with the co-proprietors, either amicably or judicially.

Upon the petition of the syndics to the judge of the parish court of New Orleans, that act of the creditors was homologated, and the syndics were authorized by the court to do all which it empowered them to perform, by the votes of the creditors who appeared or who were represented at the meeting.

In conformity with such powers, the syndics instituted a suit, alleging that Whitehall plantation and slaves had been purchased for the joint account of Barrett & Bell, and that an action of partition was necessary, to enable them to liquidate that special partnership. They also ask that the proceeds of the crop made on the plantation might be deposited in bank, subject to the order of the court; that an inventory and appraisement of the property should be made, and returned into court; and that such proceedings might be had as would lead to a prompt and final settlement of the partnership.

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Bell united in this petition, and declared himself to be a creditor of the partnership; prayed for a settlement of its affairs, and for the allowance in his favor of a lien on the partnership property, for such sum as might be found due to him.

The heirs of Hampton intervened in this partition suit, stating their claims upon the property as mortgage creditors; and insisted that the property should be sold, subject to the assumptions, by whoever might become at the sale vendee, for the payment of their claim, principal and interest.

[* 484] * On the 6th of February, 1841, the court gave a judgment, sustaining the claims of Hampton's heirs, and directing the sale of the property, with the condition, "that the vendees should assume the payment to Mary Hampton, John S. Preston and wife, and John L. Manning and wife, of \$100,000, payable on the 1st of January, 1856, with six per cent. interest from the 1st of January, 1841; and further, that it should be taken as a term and condition of the sale, that the purchaser should specially mortgage and keep mortgaged the plantation to the intervenors, and the eighty-one slaves described in the inventory, to them and their heirs and assigns."

The property was advertised and sold by the sheriff, pursuant to this judgment; was bought by the heirs of Hampton for \$116,000; was paid for by surrendering to the sheriff the bond of Leroy Pope for \$100,000, and by applying arrears of interest due on that bond to the payment of \$16,000. An account was filed a few days afterwards, by the heirs of Hampton, of the whole amount due them, and after giving credit for the \$116,000, and there was still remaining due \$11,248.11½.

A rule was then taken on both the plaintiff and defendants, by the heirs of Hampton, for them to show cause why the account should not be approved, and their demand against the partnership of Barrett & Bell be liquidated, at the sum of \$11,248.11½; and why the same should not be paid out of any money belonging to the partnership.

Upon the rule a judgment was rendered on the 23d April, 1844, according to its purport, declaring that, after having credited the account with \$116,000, there was still due to the heirs of Hampton, by the partnership of Barrett & Bell, the sum of \$11,248.11½, and a judgment was passed in their favor for that sum, against Mrs. Caroline Bell, the heir of Robert Bell, and J. B. Hullen, who had been elected the syndic of the creditors in the place of Magoffin and Morgan. A representative of the Union Bank was present, and voting for Hullen.

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A final judgment was afterwards rendered, settling all matters in dispute between the parties to the suit. The proceeds *of the crop were appropriated to the payment of the [* 485] legal charges; and, that being insufficient for that purpose, the heirs of Hampton were required to pay \$2,020.51, in satisfaction of them—it being declared that the legal charges were higher in rank than their privilege upon the copartnership fund. The heirs paid the amount, and that was a final settlement of all the matters in controversy between plaintiff, defendants, and intervenors.

Contemporary with the proceedings in the partition suit, the matters connected with Barrett's insolvency were concluded in the same court.

Among other acts done by the syndics, Magoffin and Morgan, was their petition to the parish court of New Orleans to be discharged from their office of syndics in the insolvency of Thomas Barrett and Thomas Barrett & Co. They annexed to their petition an account of the collections and disbursements which had been made by them since their last account had been filed. They showed that they were, as syndics, parties to a number of suits, which were still pending; refer particularly to the partition suit instituted by them, and still pending, against Robert Bell, as the partner of Barrett; pray that the creditors of the insolvent may be ordered to meet to elect other syndics, on account of their not being able to act longer in that capacity, as their private affairs compelled them to leave the State of Louisiana.

The court gave an order upon this petition, that the parties interested show cause, within ten days from the publication of the order, why the accounts of the syndics should not be homologated, why the funds stated by the syndics should not be distributed in accordance therewith, and why the syndics should not be discharged. And it further ordered, that a meeting of the creditors should be held on Wednesday, the 9th May, to elect another syndic in place of Magoffin and Morgan.

Such a meeting was held. James B. Hullen was elected by the creditors sole syndic, with all the powers which had been conferred by the creditors at former meetings upon Magoffin and Morgan. They were then discharged by the court from their functions as syndics, upon their paying the balances *in their [* 486] hands to the parties entitled thereto, reserving to themselves, however, whatever claim they might have on the sale of the Whitehall plantation; and James B. Hullen was confirmed as sole

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syndic of Barrett and Thomas Barrett & Co. This order was given by the court on the 20th May, 1842.

Seven days after the meeting of the creditors had been held, pursuant to the order of the court, Christopher Adams, jun., president of the Union Bank, filed a paper in the court, acknowledging himself to be fully cognizant of all the proceedings of the meeting; that he was present at it; that the bank was a creditor; that Hullen had been unanimously elected by the creditors sole syndic, in place of the former syndics, on the same terms and conditions that they had been, with the same powers which the creditors had conferred upon the former syndics. And further shows, that at the meeting on the 9th May, 1842, he had voted for the dispensation of Hullen from giving the security required by law to be given by syndics.

This narrative discloses the connection of the Hamptons with the proceedings of the syndics, and in the partnership suit which they had brought against Bell to settle his claim as a partner in the purchase of the Whitehall plantation and slaves. Thus matters remained for nine years, no one supposing that there was any irregularity in the judicial proceedings under which the heirs of Hampton had bought the property, the bank all the time acquiescing in the result. Indeed, nothing was done without the knowledge of the bank; everything that was done was with its approbation. The record shows that every step taken by the syndics for the settlement of Barrett's insolvency was in conformity with the powers which the creditors had given to them. But nine years after the final and conclusive settlement of the whole matter in controversy, the president and directors of the bank assigned to the plaintiff in this suit five judgments, which the bank had obtained against Thomas Barrett in 1838 and 1839. Upon this assignment it is that the plaintiff now claims that these judgments were a mortgage upon the Whitehall plantation and slaves. He [* 487] * alleges that all the proceedings in the parish court of the parish and city of New Orleans, in the matter of the insolvency, were irregular; that the disposition of property surrendered by Barrett for his creditors, and the creditors of Thomas Barrett & Co., "were irregular, insufficient, null, and void," and had been procured by fraudulent combination between the heirs of Hampton with Bell, and with the syndics of the creditors, for the purpose of defrauding the Union Bank particularly. He also alleges that the Union Bank has not been a party to the suit of the syndics, and that neither the bank nor himself are in any way bound by its proceedings. And the fraud with which he charges the

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defendants is, that they claimed as creditors of Barrett, under the mortgage which Leroy Pope had made to their ancestor, Hampton, when the plantation was bought from him, and which Barrett assumed to pay when he purchased from Pope, well knowing at the time that the efficacy of the inscription of the mortgages upon both plantation and slaves had expired, according to law, without any renewal of the registry of them. The defendants deny, in their answer, the fraud charged, or fraud of any kind, in their intervention in the proceedings in insolvency. No attempt was made to prove it; consequently, the plaintiff's whole case depends upon his assertion that there are irregularities in the suit, and in the rendition of a judgment, and under which the heirs of Hampton purchased the property at sheriff's sale, which made that judgment a nullity. The plaintiff is the assignee of the Union Bank, and the argument in support of his claim as assignee is, that he is entitled to a judgment, subjecting the property to the payment of the judgments which the bank had obtained against Barrett, unless the mortgages of the bank were extinguished by the sale made by the sheriff to the heirs of Hampton, and unless the settlement between the syndics, Robert Bell, and the heirs of Hampton, upon the judgments rendered in the cases of the syndics and Bell, are *res judicata*.

These positions are in themselves an abandonment of the charge of fraud, originally made, and for no other purpose than to give to the circuit court jurisdiction of the case * against [* 488] the defendants, and without which the court could not have taken jurisdiction. With what propriety, then, can this court now be called upon to review a judgment of the parish court of New Orleans for any irregularity or illegality in the proceedings of that court, if either existed, when there could have been an appeal to the supreme court of Louisiana for its correction? This court has never done so in any case in which the subject-matter of a suit, being within the jurisdiction of a State court, upon the allegation that its judgment had been given contrary to the law of a State. See the cases of *Fouvergne et al. v. City of N. O.*, 18 Howard, 471; *Gaines v. Chew et al.* 2 Howard, 619, 644; and *Tarver v. Tarver*, 9 Peters, 174. The parish court of New Orleans had, by law, full power over all the property ceded by the insolvent, and over the claims of each of the creditors. It exercised its jurisdiction, and the legality of its judgment cannot be questioned by this court. Besides, the courts of the United States have no jurisdiction over the settlement of insolvencies in the State courts. The parish court had not only jurisdiction, but exclusive jurisdiction, over the

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property surrendered, and the distribution of it among the creditors of the insolvent. By the laws of Louisiana, the property surrendered becomes vested in the creditors, represented by the syndics as their trustee. *Schroeder v. Nicholson*, 2 Lou. R. 354; *Morgan v. Creditors*, 7 Lou. R. 62; *Dwight v. Linn*, 4 An. 492. And the creditors of an insolvent who become parties to the insolvent proceedings are prohibited from seeking remedies in any other court of the State of Louisiana. *Jacobs v. Bogart*, 7 Rob. Rep. 162; *Marsh v. Marsh*, 9 Rob. Rep. 46; *Tyler et al. v. Creditors*, 9 Robinson. It is also declared, in the civil code, (art. 165, sec. 3,) "that, in all matters relative to failures, all suits already commenced, or which may be subsequently instituted against the debtor, must be carried before the court in which the failure has been declared;" and "where a party claims from the syndics goods which had been surrendered by an insolvent, the suit may be brought before the court where the *concurso* is pending." 2 Robinson, 348.

[* 489] * The want of jurisdiction, then, in the courts of the United States, to review the proceedings of the parish court of New Orleans, in a case of insolvency, is, of itself, sufficient to prevent the court from giving to the plaintiff a decree in this suit.

There are, however, other grounds sufficient, to be found in the record, from which we have concluded that the plaintiff has neither an equitable claim against the defendants in this proceeding, nor any right, under the law of Louisiana, to subject the property in controversy to the judgment of which he is the assignee. But we shall confine ourselves to the discussion of one of them.

The judgments of the Union Bank, if they ever had at any time mortgage rights against the Whitehall plantation, and the slaves upon it, better than the mortgages given by Leroy Pope at the time of his purchase, and which were assumed by Barrett when he bought the property, and which were equally obligatory upon Bell, when himself and Barrett formed their particular partnership in respect to that property, those judgments had been legally canceled before they were assigned to the plaintiff by the bank. It will be found, at pages 20 and 21 of the record, that the assignor of the plaintiff united with the other creditors in giving to the syndics the power to raise all mortgages granted by or recorded by Thomas Barrett, or Thomas Barrett & Co., on any real estate owned by Barrett, jointly with other persons, and surrendered by him to his creditors, with power also to effect partitions of the said property with his co-proprietors, either amicably or judicially, &c., &c.

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The creditors, too, authorized the syndics, or either of them, to vote, deliberate, and give their opinion for them, at any subsequent meeting of the creditors of Barrett, or Thomas Barrett & Co. And the powers so given to the syndics were homologated by the judge of the parish court of New Orleans. Under such a power, the syndics might have erased the judicial mortgages of the bank in the fair and *bona fide* discharge of their relation to the creditors as their trustees, and the bank would have been bound by their action. But * they proceeded, according to law, to [* 490] to have the judicial mortgages of the bank canceled; and they were canceled on the 1st of February, 1841. This cancellation was made by the syndics, in conformity with the thirty-second section of the act of February, 1817, entitled, "An act relative to the voluntary surrender of property, and to the mode of proceeding, as well for the direction as for the disposal of debtors' estates," &c., &c. The erasure and cancellation of mortgages may be made in Louisiana, by consent or by order of the court. Articles 3335, 3336. In this instance, the erasure was made by the judgment of a court of competent jurisdiction; when by the latter, it has the effect of a *res judicata*. 7 Rob., 382, 518; 11 Rob. 171. After the erasure so made, there can be no subsequent reinscription of a mortgage. That which was made in 1848 revived no lien upon the property which the bank's mortgages may have had before they were erased. But there was another erasure of the bank's judicial mortgages in a suit brought by Barrett against it, before its assignment was made of its judgments against Barrett to Hagan, the plaintiff. Rec. 83, 88, 94, 99, 103. It was done by a court having competent jurisdiction, and it concluded the right of the bank to convey its judgments to the plaintiff as judicial mortgages, though they might be transferred as judgments to entitle the assignee to a participation in any unadministered proceeds made from the sale of the property surrendered by the insolvent for his creditors. But neither the reinscription of 1848, nor the assignment to the plaintiff, could have the effect to give to the plaintiff any claim upon property of the insolvent which had been sold under the judgment of a court having jurisdiction in insolvency. The property now claimed by the plaintiff, as subject to his assignment, had been recognized by the judgment of the parish court to be subject to the claims of the heirs of Hampton; had been ordered by the court to be sold by the sheriff; had been sold by him, and adjudicated to the purchasers; and the consideration money of the purchase had been accounted for by the sheriff to the syndics of the insolvent, and by them accounted for

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to the court, in strict accordance with its order, nine years [* 491] before the bank made an * assignment to Hagan. The sale could not have been in any way subject to the judicial mortgages of the bank, nor could it in any way affect the property purchased by the defendants. Indeed, there can be no doubt that, after the appearance of the bank in the *concurso* of the creditors, and its acquiescence with them in fixing the terms for the sale of the property of the insolvent, it must be taken as a waiver by the bank of all its rights to pursue it for the payment of its judgments against Barrett, the insolvent, and that it would look to the proceeds of its sale, as the other creditors did, for the satisfaction of their respective claims. *Egerton v. Creditors*, 2 Rob. 201; *Saul v. Creditors*, 7 N. S. 446, 447. Without pursuing the discussion further, we have concluded that the bank, when it assigned its judgments to the plaintiff, had no mortgage lien on the Whitehall plantation and slaves to transfer; that the language of the assignment, interpreted by the acknowledged acts of the bank in the insolvency, cannot mean any such transfer, and that the judgment and sale under the partition suit barred the bank from making such an assignment, and the plaintiff from any such claim as he has made in his bill.

We direct the affirmance of the decree of the circuit court.

THE BARQUE GRIFFIN.

JOHN HOWLAND and others, Appellants, v. JOHN GREENWAY and others.

22 H. 491.

ADMIRALTY—CONTRACT OF AFFREIGHTMENT.

1. By the laws of Brazil, goods not found on the manifest of a vessel, nor added to it before delivery, are liable to seizure and confiscation. The owner of a vessel who contracted to deliver goods to consignee in Rio de Janeiro, is responsible for the failure of the master to observe this law, if the goods are thereby lost to the consignee.
2. It is no defense, under such circumstances, that the goods were actually landed and received in the custom house and the duties paid by consignees. The delivery contracted for by the master is a delivery free from prior liability to confiscation for his acts in violating the local revenue law.

APPEAL from the circuit court for the southern district of New York. The facts are sufficiently stated in the opinion of the court.

Mr. Halstead, for appellants.

Mr. Gifford and *Mr. De Forrest*, for appellees.

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* Mr. Justice CAMPBELL delivered the opinion of the court. [* 499]

This was a libel, in the district court of the United States for the southern district of New York, against the barque Griffin and her owners, on a contract of affreightment by the appellees. The libel stated, that in November, 1852, at New York, there was shipped on that barque, of which the appellants are owners, one hundred and thirty-two boxes of chairs and furniture, to be delivered at the ship's tackles at the port of Rio de Janeiro, to the appellees, according to the terms of a bill of lading.

That the regulations of the port of Rio de Janeiro require [* 500] the owner or master of a vessel arriving there, to submit to the officers of the customs a manifest of the cargo on board; and that cargo not mentioned in the manifest cannot be passed through the custom-house, but is liable to seizure and confiscation for that omission.

That the master of the barque omitted to enter the said consignment on the manifest rendered by him on his arrival, and in consequence the boxes were seized and confiscated, and so were lost to the consignees. The libelees answer that the goods referred to in the libel were discharged in accordance to the bill of lading, under the laws and regulations of the port, and under the order of the proper government officers, and went into the custom-house under the direction of the libelants, they paying the duties thereon.

That after the delivery at the ship's tackles of the said shipment, the consignees became responsible for their safety; and that they were not confiscated or forfeited to the government, nor abandoned by the consignees to the owners of the ship. Upon the pleadings and proofs, a decree was rendered against the libelees in the district court, which was affirmed in the circuit court, on appeal.

It appears from the testimony that it is the duty of a master of a foreign vessel, upon her arrival at the port of Rio de Janeiro, to deliver to the proper officer, (guarda mor,) upon his visit to the vessel, his passport, manifest, and list of passengers. He is required, "at the end of the manifest," to make such "declarations or statement for his security by adding any packages that may be omitted or exceeded in his manifest, giving his reason for such omissions; no excuse will afterwards be admitted for any omissions or error."

That, "when it is proved that the vessel brought more goods than are specified or contained in the manifest, and not declared by the master, such goods will be seized, and divided among the seizers, the master also paying into the national treasury a fine one-half their value, besides the customary duties thereon."

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further appears, that the Griffin reached the port of Rio de Janeiro in January, 1853, and that her master rendered her pass-
[* 501] port, manifest, and list of passengers, * and was required to make any statement or declaration in addition, and informed that no other opportunity would be afforded to him. The master answered, that he had no addition to make or declaration to record. The goods were discharged according to the custom of the port, under the direction and orders of the revenue officers, into the custom-house, and while there, and before the entry had been completed, they were seized and confiscated under the regulation before stated. In a petition by the master to the Brazilian government for a remission of the forfeiture and penalty he had incurred, he says: "That on the last voyage of the vessel a seizure was made of one hundred and thirty-two packages of furniture, more or less, on the ground that they were not entered in the manifest, and, although the petitioner acknowledges that the custom-house officers have acted according to the instructions of the department, still there are reasons of equity which render this seizure contrary to law."

These reasons were, that the Brazilian consul at New York was a novice in his office, and had failed to give him accurate information, and had approved of a manifest full of mistakes; and that the master had acted in good faith, and was obviously free from any suspicion of a design to defraud the revenue. This petition was referred to the director general of the revenue, who returned for answer: "That taking into consideration the quantity of the packages seized, (130 cases,) and the quality of the goods therein contained, (furniture,) and more particularly the circumstances which occurred before the seizure thereof, (the packages having been landed, and the duties paid,) there is no plausible reason to ascribe to fraud or bad faith the omissions of the said packages in the manifest of the vessel in which they were imported; but, on the other hand, the circumstances of the proof of fraud, or even of its presumption, is not essential in order to render the seizure a legal one in the present hypothesis. It is expressed in the case before mentioned, in the articles 155, 156, of the general regulations of the 22d June, 1836, that the simple fact of finding either more
or less packages is punishable with the penalties therein
[* 502] decreed; and the seizure to which the petition * refers having been made and adjudged in conformity with the provisions of the said article 155, I am of opinion that the decision of the custom-house ought to be confirmed." The decree was entered accordingly. The testimony shows that the packages

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were sold by the inspector of the customs as forfeited, and that the consignees sustained a total loss. There is no testimony to show that they contributed to produce this result. It was the duty of the master of the barque to acquaint himself with the laws of the country with which he was trading, and to conform his conduct to those laws. He cannot defend himself under asserted ignorance, or erroneous information on the subject. It is the habit of every nation to construe and apply their revenue and navigation laws with exactness, and without much consideration for the hardship of individual cases. The magnitude and variety of the interests depending upon their efficient administration compel to this, and every ship-master engaged in a foreign trade must take notice of them.

The *Vixen*, 1 Dod. 145; the *Adams*, Edwards, 310. In the case before us, the master was informed of his duties upon his arrival at the port of destination by the officers of the customs, and his embarrassment and loss can be attributed to nothing but his inattention. The question arises, whether the appellants are responsible for the miscarriage of their master and agent. Their contract is an absolute one to deliver the cargo safely, the perils of the sea only excepted. Under such a contract, nothing will excuse them for a non-performance, except they have been prevented by some one of those perils, the act of the libelants, or the law of their country. No exception of a private nature, which is not contained in the contract itself, can be engrafted upon it by implication as an excuse for its non-performance. *Atkinson v. Ritchie*, 10 East. 533. In *Spencer v. Chadwick*, 10 Q. B. R. 516, the defendants pleaded, "that the ship, in the course of her voyage to London, called at Cadiz; and while there, the goods were lawfully taken out of the ship by the officers of the customs on a charge of being contraband under the laws of Spain, without default on the part of the officers of the ship. The * court affirm the rule, that [* 503] when a party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." It was for the libelees to furnish the evidence to discharge themselves for the failure to perform their contract.

They insist that the delivery of the cargo into the custom-house under the order of the officers, and the payment of the duties by the consignees, was a right delivery, and that the consignees are responsible for their safety afterward. We do not concur in this opinion. The delivery contemplated by the contract was a transfer

Kilbourne v. The State Savings Institution of St. Louis.

of the property into the power and possession of the consignees. The surrender of possession by the master must be attended with no fact to impair the title or affect the peaceful enjoyment of the property. The failure to enter the property on the manifest was a cause of confiscation from the event, and rendered nugatory every effort subsequently to discharge the liability of the ship and owners.

The appellants complain that the proof does not support the decree in respect of the damage assessed. One witness testifies to the market value of the packages in Rio de Janeiro, and another approximates their cost in New York, and upon this testimony the assessment was made. It was competent to the appellants to introduce testimony in the circuit court, or in this court, upon that subject, but none has been submitted.

We should not be justified in concluding the decree to be erroneous under the circumstances.

Decree affirmed.

EDWARD KILBOURNE and others v. THE STATE SAVINGS INSTITUTION OF ST. LOUIS.

22 H. 503.

PRACTICE IN SUPREME COURT.

Where no question was raised by the plaintiffs in error in the court below for the consideration of this court, and none is raised here by counsel or otherwise, the judgment will be affirmed with damages for delay.

WRIT of error to the district court for the district of Iowa. There was no appearance for plaintiffs in error. No error was alleged or apparent in the record.

Mr. Blair and *Mr. Polk*, for defendants in error.

[* 504] * Mr. Justice WAYNE delivered the opinion of the court.

No question was raised upon the trial of this case in the court below, for the consideration of this court, nor have the plaintiffs in error, by counsel or otherwise, made one here. The writ of error was obviously sued out for delay. We direct the affirmance of the judgment and ten per cent. damages.

Order.

It is now here ordered and adjudged by this court, that the judgment of the said district court in this cause be and the same is hereby affirmed with costs and interest at the rate of ten per cent. per annum.

DECISIONS
OF THE
SUPREME COURT OF THE UNITED STATES,

DECEMBER TERM, 1859.

JUSTICES OF THE COURT.

HON. ROGER B. TANEY, CHIEF JUSTICE.

HON. JOHN MCLEAN,

HON. JAMES M. WAYNE,

HON. JOHN CATRON,

HON. PETER V. DANIEL,

HON. SAMUEL NELSON,

HON. ROBERT C. GRIER,

HON. JOHN A. CAMPBELL,

HON. NATHAN CLIFFORD,

JEREMIAH S. BLACK, ATTORNEY GENERAL.

WILLIAM THOMAS CARROLL, CLERK.

BENJAMIN C. HOWARD, REPORTER.

WILLIAM SELDEN, MARSHAL.

} ASSOCIATE JUSTICES.

ANSON, BANGS & Co., Appellants, v. THE BLUE RIDGE RAILROAD
COMPANY.

23 H. 1.

PRACTICE IN SUPREME COURT.—ABSENCE OF APPEAL BOND.

1. Where the appeal has been allowed, but no appeal bond given either for the costs or a *superedeas*, the appeal will not be dismissed if the appellant file a sufficient bond within a reasonable time to be fixed by this court.
2. Such bond must be approved by one of the judges authorized to allow the appeal.

APPEAL from the circuit court for the northern district of Georgia.

Mr. Phillips, for appellee, moved to dismiss the appeal because no bond had been given when the appeal was taken or since.

Mr. Johnson, for appellants, offered to give a sufficient bond for costs, and opposed the motion to dismiss.

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After argument by these two counsel, Mr. Justice NELSON delivered the opinion of the court.

This is a motion to dismiss the appeal, on the part of the appellee, upon the ground that no appeal bond was given [* 2] at the * time of granting the appeal, as required by the statute, either as a security for costs or *supersedeas* of execution. 1 Stat. at Large, pages 84, 85, secs. 22, 23, p. 404.

It is admitted that no bond was given, but the counsel resisting the motion proposes to give one for the costs, and thus prevent the dismissal, if consistent with the practice of the court. The practice has been allowed in several cases, as will be seen by reference to 10 Wh. R. 311, 16 How. 148, and 9 Wh. 555. In the last case, time was granted within which to give the bond, or the case be dismissed. The bond may be taken and approved before any judge or justice authorized to allow the appeal or writ of error.

Let the appellant have sixty days to give the bond, and file it with the clerk, upon complying with which order the motion be dismissed; otherwise, granted.

LEWIS TEESE and LEWIS TEESE, JR., Plaintiffs in Error, v. C. P. HUNTINGDON and MARK HOPKINS.

23 H. 2.

PATENT LAW—NOTICE OF PRIOR INVENTION—EVIDENCE.

1. Where the notice of proof of prior use of invention is sufficient, it is not essential to the introduction of the evidence on the trial that it should be served and filed in court with an order of the court.
2. Depositions taken before such notice may be used on the trial in the same manner as if the witness were introduced in person.
3. For the purpose of impeaching a witness, the general question, "What is his reputation for moral character?" was properly overruled by the court below.
4. It was also held to be within the discretion of the court to refuse to allow a witness to testify as to the other witness's reputation for truth and veracity five years previously, when he stated he knew nothing of his character since that time.

WRIT of error to the circuit court for the northern district of California. The case is fully stated in the opinion.

Mr. Phillips, for plaintiffs in error.

Mr. Gifford, for defendants.

[* 6] * Mr. Justice CLIFFORD delivered the opinion of the court.
This is a writ of error to the circuit court of the United

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States for the northern district of California. According to the transcript, the declaration in this case was filed on the eighteenth day of March, 1856. It was an action of trespass on the case for an alleged infringement of certain letters patent purporting to have been duly issued to the plaintiffs for a new and useful improvement in a certain machine or implement called a sluice-fork, used for the purpose of removing stones from sluices and sluice-boxes in washing gold. As the foundation of the suit, the plaintiffs in their declaration set up the letters patent, alleging that they were the original and first *inventors of the [* 7] improvement therein described, and charged that the defendants, on the second day of July, 1855, and on divers other days and times between that day and the day of the commencement of the suit, unlawfully and without license vended and sold a large number of the improved forks made in imitation of their invention. To this charge the defendants pleaded the general issue, and in addition thereto, set up in their answer to the declaration two other grounds of defense. In the first place they denied that the plaintiffs were the original and first inventors of the improvement described in the letters patent, averring that the supposed improvement was known and used by divers other persons in the United States long before the pretended invention of the plaintiffs. They also alleged that the improvement claimed by the plaintiffs, as their invention, was not the proper subject of a patent within the true intent and meaning of the patent law of the United States.

By the fifteenth section of the patent act of the fourth of July, 1836, the defendant, in actions claiming damages for making, using, or selling, the thing patented, is permitted to plead the general issue, and for certain defenses, therein specified, to give that act and any special matter in evidence which is pertinent to the issue, and of which notice in writing may have been given to the plaintiff or his attorney thirty days before the trial. Within that provision, and subject to that condition, he may, under the general issue, give any special matter in evidence tending to prove that the patentee was not the original and first inventor or discoverer of the thing patented, or a substantial and material part thereof claimed as new, or that it had been described in some public work anterior to the supposed discovery by the patentee, or had been in public use, or on sale, with the consent and allowance of the patentee, before his application for a patent. But whenever the defendant relies in his defense on the fact of a previous invention or knowledge or use of the thing patented, he is required to "state in his notice of special matter the names and places of

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residence of those whom he intends to prove to have possessed a prior knowledge of the thing, and where the same had been used."

[* 8] * Two written notices were accordingly given by the defendants of special matter to be offered in evidence by them at the trial, in support of the first ground of defense set up in the answer to the declaration. One was dated on the twenty-eighth day of August, 1856, and the other on the nineteenth day of September of the succeeding year, but they were both duly served and filed in court more than thirty days before the trial. Upon this state of the pleadings the parties on the twentieth day of October, 1857, went to trial, and the jury, under the rulings and instructions of the presiding justice, returned their verdict for the defendants. After the plaintiffs had introduced evidence tending to prove the alleged infringement of their patent, they claimed that counsel fees were recoverable as damages in this action, and offered proof accordingly, in order to show what would be a reasonable charge in that behalf.

That evidence was objected to by the defendants, upon the ground that counsel fees were not recoverable as damages in actions of that description, and the court sustained the objection, and excluded the evidence. To which ruling the plaintiffs excepted. Little or no reliance was placed upon this exception by the counsel of the plaintiffs, and in view of the circumstances one or two remarks upon the subject will be sufficient. Suppose it could be admitted that counsel fees constituted a proper element for the consideration of the jury, in the estimation of damages in cases of this description; still the error of the court in excluding the evidence would furnish no ground to reverse the judgment, for the reason that the verdict was for the defendants. For all purposes connected with this investigation, it must be assumed, under the finding of the jury, that the plaintiffs were not entitled to any damages whatever; and if not, then the evidence excluded by the ruling of the court was entirely immaterial. But the evidence was properly rejected on the ground assumed by the presiding justice.

Counsel fees are not a proper element for the consideration of the jury in the estimation of damages in actions for the infringement of a patent right. That point has been directly

[* 9] * ruled by this court, and is no longer an open question.

Jurors are required to find the actual damages incurred by the plaintiff at the time his suit was brought; and, if in the opinion of the court, the defendant has not acted in good faith, or has caused unnecessary expense and injury to the plaintiff, the

court may render judgment for a larger sum, not exceeding three times the amount of the verdict. 5 Stat. at Large, page 123. *Day v. Woodworth*, 13 How. 372. To maintain the issue on their part the defendants offered three depositions, each tending to prove that the plaintiffs were not the original and first inventors of the improvement described in their letters patent.

Objection was seasonably made by the plaintiffs to the introduction of each of these depositions on two grounds: 1. Because the first notice of special matter to be introduced at the trial did not accord with the proof offered, as contained in these depositions. 2. Because the second notice of special matter to be thus introduced was served and filed without any order from the court, and therefore should be disregarded.

Exceptions were duly taken to the respective rulings of the court, in admitting each of these depositions; but as they all depend upon the same general considerations, they will be considered together.

It is conceded by the defendants that the first notice was, to some extent, insufficient. On the other hand, it is admitted by the plaintiffs that the terms of the second notice were sufficiently comprehensive and specific to justify the rulings of the court, in allowing the depositions to be read to the jury. They, however, insist upon the objection, taken at the trial, that it was served and filed without any order of the court, and that it was insufficient, because it was served and filed subsequently to the time when the depositions were taken and filed in court.

But neither of these objections can be sustained. All that the act of congress requires is, that notice of the special matter to be offered in evidence at the trial shall be in writing, and be given to the plaintiff, or his attorney, more than thirty days before the trial. By the plain terms of the law, it is a * right [* 10] conferred upon the defendant; and of course he may exercise it in the manner and upon the conditions therein pointed out, without any leave or order from the court. When the notice is properly drawn, and duly and seasonably served and filed in court as a part of the pleadings, nothing further is required to give the defendant the full and unrestricted benefit of the provision.

Such notice is required, in order to guard patentees from being surprised at the trial by evidence of a nature which they could not be presumed to know or be prepared to meet, and thereby subject them either to delay or a loss of their cause. To prevent such consequences, the defendant is required to specify the names and places of residence of the persons on whose prior knowledge of the

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alleged improvement he relies to disprove the novelty of the invention, and the place or places where the same had been used. *Wilton v. Railroads*, 1 Wall, jun., 195.

Compliance with this provision, on the part of the defendant, being a condition precedent to his right to introduce such special matter under the general issue, it necessarily follows that he may give the requisite notice without any leave or order from the court; and for the same reason, if he afterwards discovers that the first notice served is defective, or not sufficiently comprehensive to admit his defense, he may give another, to remedy the defect or supply the deficiency, subject to the same condition that it must be in writing, and be served more than thirty days before the trial.

Having given the notice as required by the act of congress, the defendant at the trial may proceed to prove the facts therein set forth by any legal and competent testimony. For that purpose, he may call and examine witnesses upon the stand, or he may introduce any deposition which has been legally taken in the cause. Under those circumstances, depositions taken before the notice was served, as well as those taken afterward, are equally admissible, provided the statements of the deponents are applicable to the matters thus put in issue between the parties.

After the defense was closed, the plaintiffs offered [* 11] evidence * to impeach one of the witnesses, who had given material testimony for the defendants. When called, the impeaching witness stated that he knew the witness sought to be impeached, and knew other persons who were acquainted with the witness, and that they both resided in the city of Sacramento; whereupon, the counsel of the plaintiffs put the question, "What is the reputation of the witness for moral character?" To that question, the counsel of the defendants objected, on the ground that the inquiry should be limited to the general reputation of the witness for truth and veracity, with the right to put the further inquiry whether the witness testifying would believe the other on his oath; and the court sustained the objection, and rejected the testimony.

No reasons were assigned by the court for the ruling; and of course the only point presented is, whether the particular question propounded was properly excluded.

Courts of justice differ very widely, whether the general reputation of the witness for truth and veracity is the true and sole criterion of his credit, or whether the inquiry may not properly be extended to his entire moral character and estimation in society. They also differ as to the right to inquire of the impeaching witness

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whether he would believe the other on his oath. All agree, however, that the first inquiry must be restricted either to the general reputation of the witness for truth and veracity, or to his general character; and that it cannot be extended to particular facts or transactions, for the reason that, while every man is supposed to be fully prepared to meet those general inquiries, it is not likely he would be equally so without notice to answer as to particular acts.

According to the views of Mr. Greenleaf, the inquiry in all cases should be restricted to the general reputation of the witness for truth and veracity; and he also expresses the opinion that the weight of authority in the American courts is against allowing the question to be put to the impeaching witness whether he would believe the other on his oath. In the last edition of his work on the law of evidence, he refers to several decided cases, which appear to support these positions; * and it must be [* 12] admitted that some of these decisions, as well as others that have since been made to the same effect, are enforced by reasons drawn from the analogies of the law, to which it would be difficult to give any satisfactory answer. 1 Greenl. Ev. sec. 461; Phillips v. Kingfield, 19 Me. 375, per Shepley, J.; Goss v. Stimpson, 2 Sum. 610; Wood v. Mann, 2 Sum. 321; Craig v. the State, 5 Ohio N. S. 605; Filbert v. Sheldon, 13 Barb. 623; Jackson v. Lewis, 13 Johns. R. 504; United States v. Van Sickle, 2 McLean, 219; State v. Bruce, 24 Me. 72; Com. v. Morse, 3 Pick. 196; Gilchrist v. McKee, 4 Watts, 380; State v. Smith, 7 Vt. R. 141; Frye v. Bank of Illinois, 11 Ill. R. 367; Jones v. the State, 13 Texas R. 168; State v. Randolph, 24 Conn. R. 363; Uhl v. Com. 6 Gratt. 706; Wike v. Lightner, 11 S. and R. 338; Kemmel v. Kemmel, 3 S. and R. 338; State v. Howard, 9 N. H. 485; Buckner v. The State, 20 Ohio, 18; Ford v. Ford, 7 Humphr. 92; Thurman v. Virgin, 18 B. Monroe, 792; Perkins v. Nobley, 4 Ohio N. S. 668; Bates v. Barber, 4 Cush. 107.

On the other hand, a recent English writer on the law of evidence, of great repute, maintains that the inquiry in such cases properly involves the entire moral character of the witness whose credit is thus impeached, and his estimation in society; and that the opinion of the impeaching witness, as to whether he is entitled to be believed on his oath, is also admissible to the jury. 2 Taylor Ev. secs. 1082, 1083.

That learned writer insists that the regular mode of examining into the character of the witness sought to be impeached is to ask the witness testifying whether he knows his general reputation; and if so, what that reputation is, and whether, from such knowl-

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edge, he would believe him upon his oath. In support of this mode of conducting the examination, he refers to several decided cases, both English and American, which appear to sustain the views of the writer. *Rees v. Watson*, 32 How. St. Tr. 496; *Mawson v. Hartsink*, 4 Esp. R. 104; *Rex v. Rockwood*, 13 How. St. Tr. 211; *Carpenter v. Wall*, 11 Ad. and El. 803; *Anonymous*, 1 Hill, (S. C.) 259; *Hume v. Scott*, 3 A. K. Marshall, 262; *Day v. The State*, 13 Mis. 422; 3 Am. Law Jour. N. S. 145.

[* 13] * Both Mr. Greenleaf and Mr. Taylor agree, however, that the impeaching witness must be able to state what is generally said of the other witness by those among whom he resides, and with whom he is chiefly conversant, and in effect admit, that unless he can so speak, he is not qualified to testify upon the subject, for the reason that it is only what is generally said of the witness by his neighbors that constitutes his general reputation. To that extent they concur, and so, as a general remark, do the authorities which on the one side and the other support these respective theories; but beyond that, the views of these commentators, as well as the authorities, appear to be irreconcilable.

In referring to this conflict of opinion among text writers, and judicial decisions, we have not done so because there is anything presented in this record that makes it necessary to choose between them, or even renders it proper that we should attempt at the present time to lay down any general rule upon the subject. On the contrary, our main purpose in doing so is to bring the particular question exhibited in the bill of exceptions to the test of both theories, in order to ascertain whether under either rule of practice it ought to have been allowed. Under the first mode of conducting the examination, it is admitted that it was properly rejected, and we think it was equally improper, supposing the other rule of practice to be correct. Whenever a witness is called to impeach the credit of another, he must know what is generally said of the witness whose credit is impeached by those among whom the last-named witness resides, in order that he may be able to answer the inquiry either as to his general character in the broader sense, or as to his general reputation for truth and veracity. He is not required to speak from his own knowledge of the acts and transactions from which the character or reputation of the witness has been derived, nor indeed is he allowed to do so, but he must speak from his own knowledge of what is generally said of him by those among whom he resides, and with whom he is chiefly conversant; and any question that does not call for such knowledge is an im-

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proper one, and ought to be rejected. No case has been cited * authorizing such a question, or even furnishing an [* 14] example where it was put, and our researches in that direction have not been attended with any better success. For these reasons, we think the question was properly excluded. Some further attempts were made by the plaintiffs to impeach this witness, and with that view they called another witness, who testified that he knew the one sought to be impeached, and had had business transactions with him during the years 1852-'53 in the city where they resided. On being asked by the counsel of the plaintiffs what was the reputation of the witness for truth and veracity, he replied that he had no means of knowing what it was, not having had any dealings with him since those transactions; thereupon the same counsel repeated the question, limiting it to that period.

Objection was made to that question by the counsel of the defendants on the ground that the period named in the question was too remote, and the court sustained the objection and excluded the question. To this ruling the plaintiffs excepted. Such testimony undoubtedly may properly be excluded by the court when it applies to a period of time so remote from the transaction involved in the controversy, as thereby to become entirely unsatisfactory and immaterial; and as the law cannot fix that period of limitation, it must necessarily be left to the discretion of the court. Considering that the witness had already stated that he was not able to answer the question, we do not think that the discretion of the court in this case was unreasonably exercised. None of the exceptions can be sustained, and the judgment of the circuit court is therefore affirmed with costs.

ANDREW LAWRENCE, Appellant, v. HIRAM A. TUCKER.

23 H. 14.

MORTGAGE.—SECURITY FOR FUTURE ADVANCES.

1. It is the settled doctrine of the court that mortgages to secure future advances are valid when the transactions covered by it are fair and honest.
2. A mortgage given to secure a note for \$5,000 and future advances for \$6,000 more on its face is a standing security for \$11,000, if so intended by the parties, and duly recorded, and will be held valid to that amount against subsequent purchasers or incumbrances, without reference to the actual amount advanced on the note at the time it was given and the mortgage executed.

APPEAL from the circuit court for the northern district of Illinois.
The facts of the case are fully stated in the opinion.

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Mr. B. R. Curtis, for appellant.

Mr. Vinton and *Mr. Hayne*, for appellee.

[* 22] *Mr. Justice WAYNE delivered the opinion of the court.
We have been unable to find anything in this record to authorize us to change or modify the decree made by the circuit court in this case.

Andrew Lawrence filed his bill in that court, for the northern district of Illinois, against Hiram A. Tucker, to redeem the furniture of a hotel in the city of Chicago, called the Briggs House, upon which Tucker has a mortgage.

On the 1st of September, 1856, John J. Floyd and [* 23] George * H. French, who then were the keepers of that hotel, wishing to have a current business credit with Tucker and the firm of H. A. Tucker & Co., and the bank named in the mortgage, executed, under the name and firm of Floyd & French, to Hiram A. Tucker, a mortgage of the furniture of the hotel, to secure a note of Floyd & French, made to Tucker, for \$5,500, and such advances of money as there had been or might be made within two years, by H. A. Tucker, H. A. Tucker & Co., or the Exchange Bank of H. A. Tucker & Co., not to exceed in all an indebtedment of six thousand dollars in addition to the sum for which their note was given. The note was dated on the 1st of September, the day on which the mortgage was made, payable one day after date, with interest at the rate of ten per cent. per annum. The note was to be held by Tucker, as a collateral security for such advances as have just been stated, and the amount of the note also. Under this arrangement, successive advances were made to Floyd & French, on their checks or by discount of their notes, until some time in October, 1857, when they ceased.

Tucker, during this time, continued to hold the note for \$5,500. He also held several other promissory notes of Floyd & French, as appears by the exhibits, C, D, E, G, H, annexed to Tucker's answer to the complainant's bill. All of these notes, except that for \$2,000, are drawn payable to H. A. Tucker; all of them are prior in dates to other mortgages upon the same furniture, except the note just mentioned for \$2,000, and that was a renewal of a note for a loan made on the 26th September, 1857, prior to the date of the mortgages made to Briggs & Atkins. The mortgage to Briggs was made on the 19th November, 1857, by Floyd & French, and one Ames, who had been taken into their firm. It was given to secure debts due to Briggs, and liabilities he had assumed for them, and also for such advances of money as Briggs

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might thereafter make to them, with a power of sale on default. When Briggs took this mortgage, he knew that Tucker had a prior mortgage on the same furniture, and he states in his evidence that he knew advances of money had been made upon it by Tucker, for which he knew it stood as a security.

* On the 12th of January, 1858, Floyd & French and [* 24] Ames made a third mortgage of the same property to Henry Atkyns, as trustee, with a like power of sale, to secure debts mentioned in it. Both of these mortgages refer to Tucker's mortgage as an existing encumbrance upon the furniture, &c., &c. Briggs and Atkyns had then, of course, notice of Tucker's mortgage.

Atkyns sold the furniture under his power of sale on the 27th February, 1858; Briggs sold under his power of sale on the 12th March following. Lawrence became the purchaser at both sales. Briggs sold to him expressly subject to the mortgage of French & Floyd to H. A. Tucker; and Lawrence admits, by a stipulation in the record, that when he purchased the property under the mortgages, he had notice that either the defendant Hiram A. Tucker or H. A. Tucker & Co. held the notes against Floyd & French, as they are set forth in the defendant's answer, and that the amount was claimed to be due upon them, as it is set out in the answer.

Upon referring to that answer, and its exhibits, C, D, E, G, H, we find that the only securities now claimed to be due are, with one exception, notes of hand given by Floyd & French, payable to the order of H. A. Tucker alone, precisely within the mortgage, and that the note of December 18th, 1857, payable to H. A. Tucker & Co., for the sum of two thousand dollars, payable at the counting-house of H. A. Tucker & Co., in Chicago, was for an actual loan of money, and that it was the renewal of a former note for the same sum, dated the 26th September, 1857.

We have, then, the admission of the complainant, that when he purchased under the mortgages of Briggs & Atkyns, he knew the particular items constituting the outstanding unpaid debt of Floyd & French to Hiram A. Tucker and H. A. Tucker & Co. for advances. One of these notes, dated the 14th October, 1857, was for \$1,000, exhibit C; another, dated 22d October, 1857, exhibit D, was for \$3,000; the third, exhibit E, dated July 11, was for \$450; exhibit G, of the same date, was a note for the sum of \$5,000; and exhibit H, dated the 18th December, 1857, was for \$2,000.

Floyd, who did the financial business of the firm of Floyd & French, testifies that the notes just mentioned [* 25] were given for advances; but he claims a credit of \$1,500

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on the note, exhibit D; and states that the note for \$450, exhibit E, had not been given for money advanced, but that it and another note for the same amount were given for the interest for one year on the note for \$5,500. Floyd also states that the note marked exhibit I, for \$5,500, was signed by himself when he signed the mortgage, and that he personally made the negotiation with H. A. Tucker & Co.

It is further stated by him, that the aggregate amount of all the advances which had been made by the defendant to his firm upon the faith of the note and the mortgage, since the first of September, 1856, amounted to "from fifty to a hundred thousand dollars," and that the sum now remaining due was "somewhere in the vicinity of ten thousand dollars." He verifies the notes named in the exhibits, C, D, E, G, H, with the originals; confirms the statement in exhibit A of the discounts which his firm had received under the note and mortgage; and adds, that when the note and mortgage were given, his firm then owed to H. A. Tucker & Co. twenty-five hundred dollars, which was paid on the 7th September, 1856; and repeats in his cross-examination what he had said in his examination in chief, concerning the amount of the discounts and cash received from H. A. Tucker & Co. under the note and mortgage.

It must have been upon the testimony of this witness that the court below gave its decree.

But we have not referred to it with the view of testing the correctness of the sum allowed to the defendant, as the condition upon which the complainant might redeem the mortgage—though, having made the computation, we find it to be correct, with a small mistake. Our object has been to show that the parties to the original transaction understood it alike, and acted upon it accordingly; that there never was a difference between them, as to the character of the mortgage and its purpose; and that it was intended to be a security for and a lien upon the property mortgaged for future advances to the extent of the sum provided for in it. So [* 26] also Floyd & * French represented it to be in their transactions with others, when they found it convenient to their business to give other mortgages upon the same property for the security of other creditors.

We consider it to be a mortgage for future advances, that they were subsequently made in conformity with its provisions, and that the proofs that they were so, were rightly received by the court below to substantiate them. There is neither indirectness nor uncertainty in the terms used in the mortgage, to make it doubtful that it was intended to cover the note for \$5,500 and for future

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advances. It is stated in terms that it was intended for that purpose. The note, though expressed to be an existing indebtedness at the date of the mortgage, secured to be paid by a promissory note, payable one day after date, is associated with the advances to be made to Floyd & French to the amount of \$6,000; but it is proved that the note and mortgage were in fact taken as a security for advances thereafter to be made, and that it was done without any other purpose than to get a credit extended to them of eleven thousand five hundred dollars, instead of advances only to the amount of \$6,000. It is objected that the difference makes the transaction subsidiary.

An objection of this kind was made in the case of *Shirras v. Caig*, 7 Cranch, 34; but this court then said, it is true the real transaction does not appear on the face of the mortgage; the deed purports to have been a debt of thirty thousand pounds sterling, *due to all of the mortgagees*. It was really intended to have different sums due at the time to particular mortgagees, advances afterwards to be made, and liabilities to be encountered to an uncertain amount. After remarking that such misrepresentations of a transaction are liable to suspicion, Chief Justice Marshall adds: "But if, upon investigation, the real transaction shall appear to be fair, though somewhat variant from that which is described, it would seem to be unjust and unprecedented to deprive the person claiming under the deed real equitable rights, unless it be in favor of a person who has been in fact injured and deceived by the misrepresentation." In this case the complainant has not been *deceived, and the variance between the alleged indebted- [* 27] ness and that advances were to be made afterwards gives to his suit no additional force or equity.

No proof was given by the complainant that he had been injured or deceived by it into making his purchase under the mortgages of Briggs and Atkins, and that cannot be presumed in his behalf. In fact, there is not an averment in the complainant's bill in favor of the equity of his demand, which is not met and denied in the defendant's answer, and which has not been disproved by competent testimony. We do not think there is anything in the objection that the mortgage to H. A. Tucker to secure future advances by the firm of H. A. Tucker & Co. cannot stand as security for advances made after the admission of new partners into that firm. The cases cited in support of this objection do not sustain it, and we have not been able to find any one that does. They relate exclusively to stipulations for an advancement of money to a co-partnership after a new member has been taken into the firm.

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In respect to the validity of mortgages for existing debts and future advances, there can be no doubt, if any principle in the law can be considered as settled by the decisions of courts. This court has made three decisions directly and inferentially in support of them: *United States v. Hooe*, 3 Cranch, 73; *Conrad v. Atlantic Insurance Company*, 1 Peters, 448; *Shirras v. Caig*, 7 Cranch, 34. Tilghman, C. J., says, in 5 Binney, 590, *Lyle v. Ducomb*, "there cannot be a more fair; *bona fide*, and valuable consideration than the drawing or endorsing of notes at a future period, for the benefit and at the request of the mortgagors; and nothing is more reasonable than the providing a sufficient indemnity beforehand." Mr. Justice Story declared, in *Leeds v. Cameron*, 3 Sumner, 492, that nothing can be more clear, both upon principle and authority, than that at the common law a mortgage, *bona fide* made, may be for future advances by the mortgagee as well as for present debts and liabilities. I need not do more upon such a subject than to refer to the cases of the *United States v. Hooe*, 3 Cranch, 73, and *Conrad v. The Atlantic Insurance Company*, 1 Peters, 448.

[* 28] * We affirm the decree of the circuit court in this case, and shall remand it there for execution.

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CHARLES RICHARDSON and others, Appellants, v. DAVID GODDARD and others.

23 H. 28.

DELIVERY BY COMMON CARRIERS—HOW AFFECTED BY A FAST-DAY PROCLAIMED BY THE GOVERNOR.

1. What constitutes a delivery to a consignee in an ordinary contract of affreightment will depend largely on the established usages of the particular trade, and of the port in which the delivery is made.
2. By the commercial and maritime law it is the settled rule that the carrier by water shall carry from port to port and from wharf to wharf, and is not bound to deliver at the warehouse or business place of the consignee.
3. Goods delivered at the proper wharf at a proper time, with notice to consignee, is a good delivery, though, if consignee refused to receive it, it is the duty of the carrier to put them in a place of safety.
4. The day of fasting and prayer fixed by proclamation of the governor of Massachusetts is not, by law or by any general usage or custom of the city of Boston, a day on which labor or business is forbidden, and a delivery on that day on the wharf was a valid delivery; and a loss by fire consequent on the failure of the consignees to remove the goods from the wharf on that day is not chargeable to the vessel or her owners.

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APPEAL from the circuit court for the district of Massachusetts, sitting in admiralty. The case is very well stated in the opinion.

Mr. Shepley, for appellants.

Mr. Cushing, for appellees.

* Mr. Justice GRIER delivered the opinion of the court. [* 37]

The barque "Tangier, a foreign vessel in the port of Boston," is charged in the libel with a failure to deliver certain bales of cotton, according to her contract of affreightment. The answer admits the contract, and alleges a full compliance with it, by a delivery of the cargo on the wharf; and that after such delivery, a part of the cargo was consumed by fire, before it was removed by the consignees.

The libelants amended their libel, admitting the receipt of 163 bales, and setting forth, as a reason for not receiving and taking away from the wharf that portion of the cargo which was unladen on Thursday, "that, by the appointment of the governor of Massachusetts, that day was kept and regarded by the citizens as 'a day of fasting, humiliation, and prayer,' and that from time immemorial it has been the usage and custom to abstain from all secular work on that day;" and consequently, that the libelants were not bound to receive the cargo on that day; and that such a delivery, without their consent or agreement, is not a delivery or offer to deliver in compliance with the terms of the bill of lading.

Three questions of law were raised on the trial of this case below :

1. Whether the master is exempted from liability for a loss occasioned by accidental fire, after the goods are deposited on the wharf, by the act of congress of March 3d, 1851.

2. Whether the master is liable, under the circumstances of this case, for the loss of the cotton, on the general principles of the maritime law, excluding the fact of fast-day.

3. If not, whether the right of the carrier to continue the discharge of his cargo is affected by the fact that the governor had appointed that day as a general fast-day.

* As our decision of the second and third of these points [* 38] will dispose of this case, we do not think it necessary to express any opinion on the first.

We will first inquire whether there was such a delivery of cargo in this case as should discharge the carrier under this contract of affreightment, irrespective of the peculiar character of the day.

The facts in evidence, so far as they are material to the correct decision of this point, are briefly as follows:

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The barque Tangier arrived in the port of Boston on the 8th of April, with a cargo of cotton, intending to discharge at Battery wharf; but at the request of the consignees, and for their convenience, she "hailed up" at Lewis's wharf. She commenced the discharge of her cargo on Monday, the seventh, and on the same day the master gave notice to the consignees of his readiness to deliver the goods. The unlading was commenced in the afternoon, and was continued through the forenoon of Tuesday, when, the cotton not being removed, the wharf became so full that the work was suspended. Notice was again given to the consignees; and they still neglecting to remove their cotton, a third notice was added on Wednesday morning. On the afternoon of that day, all the cotton which had been unladen on Monday and Tuesday was removed, excepting 325 bales, which remained on the wharf over night. On Thursday morning, the wharf was so far cleared that the unlading was completed by one o'clock p. m. On that day, the libelants took away about five bales, and postponed taking the rest till the next day, giving as a reason that it was fast-day. About three o'clock of this day, the cotton remaining on the wharf was consumed or damaged by an accidental fire.

The contract of the carrier, in this case, is "to deliver, in like good order and condition, at the port of Boston, unto Goddard & Pritchard."

What constitutes a good delivery, to satisfy the exigency of such a contract, will depend on the known and establish usages of the particular trade, and the well-known usages of the port in which the delivery is to be made.

[* 39] * A carrier by wagon may be bound to deliver his freight at the warehouse of the consignee; carriers by railroad and canal usually deliver at warehouses belonging to themselves or others. Where the contract is to carry by sea, from port to port, an actual or manual tradition of the goods into the possession of the consignee, or at his warehouse, is not required in order to discharge the carrier from his liability as such.

There is no allegation of a particular custom as to the mode and place of delivery, peculiar to the city of Boston, which the carrier has not complied with. The general usages of the commercial and maritime law, as settled by judicial decisions, must therefore be applied to the case. By these, it is well settled that the carrier by water shall carry from port to port, or from wharf to wharf. He is not bound to deliver at the warehouse of the consignee; it is the duty of the consignee to receive the goods out of the ship or on the wharf. But to constitute a valid delivery on the wharf, the carrier.

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should give due and reasonable notice to the consignee, so as to afford him a fair opportunity of providing suitable means to remove the goods, or put them under proper care and custody.

Such a delivery, to be effectual, should not only be at the proper place, which is usually the wharf, but at a proper time. A carrier who would deposit goods on a wharf at night or on Sunday, and abandon them without a proper custodian, before the consignee had proper time and opportunity to take them into his possession and care, would not fulfill the obligation of his contract. When goods are not accepted by the consignee, the carrier should put them in a place of safety; and when he has so done, he is no longer liable on his contract of affreightment.

Applying these principles to the facts of this case, it is clear that (saving the question as to the day) the respondents are not liable on their contract of affreightment for the loss of the goods in question. They delivered the goods at the place chosen by the consignees, and where they agreed to receive them, and did receive a large portion of them, after full and fair notice.

The goods were deposited for the consignees in proper order * and condition, at mid-day, on a week day, in good [* 40] weather. This undoubtedly constituted a good delivery; and the carriers are clearly not liable on their contract of affreightment, unless, by reason of the fact next to be noticed, they were restrained from unlading their vessel and tendering delivery on that day.

II. This inquiry involves the right of the carrier to labor on that day, and discharge cargo, and not the right of the consignee to keep a voluntary holiday, and to postpone the removal of the goods to his warehouse to a more convenient season. The policy of the law holds the carrier to a rigorous liability; and in the discharge of it, he is not bound to await the convenience or accommodate himself to the caprice or conscientious scruples of the consignee. The master of a ship usually has a certain number of lay-days. He is bound to expedite the unlading of his vessel, in order to relieve the owners from the expense of demurrage, and to liberate the ship from the onerous liability of the contract of affreightment as soon as possible. He has six days of the week in which to perform this task, and has a right to demand the acceptance of his freight by the consignee. The consignee may think it proper to keep Saturday as his Sabbath, and to observe Friday as a fast day, or other church festival, or he may postpone the removal of the goods because his warehouse is not in order to receive them; but he cannot exercise his rights at the expense of others, and compel the

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carrier to stand as insurer of his property, to suit his convenience or his conscience.

Let us inquire, then, first, whether there is any law of the State of Massachusetts which forbids the transaction of business on the day in question; 2dly. If not, is there any general custom or usage engrafted into the commercial or maritime law, and making a part thereof, which forbids the unlading of vessels and a tender of freight to the consignee on the day set apart for a church festival, fast, or holiday; and 3dly. If not, is there any special custom in the port of Boston which prohibits the carrier from unlading his vessel on such a day, and compels him to observe it as a holiday.

1. There is no statute of Massachusetts which forbids [* 41] the *citizen to labor and pursue his worldly business on any day of the week, except on the Lord's day, usually called Sunday. In the case of *Farnum v. Fowle*, (12 Mass. Rep. 94,) it is said by Chief Justice Parker: "There are no fixed and established holidays in Massachusetts, in which all business is suspended," except Sunday.

2. The observance of Sunday as a Sabbath or day of ceremonial rest was first enjoined by the Emperor Constantine as a civil regulation, in conformity with the practice of the christian church. Hence it is a maxim of the civil law, "*Diebus dominicis mercari, judicari vel jurari non debet.*" This day, with others soon after added by ecclesiastical authority, (such as "*Dies natalis*," or Christmas, and "*Pascha*," or Easter,) were called "*Dies festi*," or "*Feriae*," which we call festivals, saints' days, holy days, or holidays. In the thirteenth century, the number of these festivals enjoined by the church was so increased that they exceeded the number of Sundays in the year. The multiplication of them by the church had its origin in a spirit of kindness and christian philanthropy. Their policy was to alleviate the hardships and misery of predial slaves and the poor laborers on the soil who were compelled to labor for their feudal lords. But afterwards, when these vassals were enfranchised and tilled the earth for themselves, they complained that "they were ruined" by the number of church festivals or compulsory holidays. In 1695, the French king forbid the establishment of any *new* holidays, unless by royal authority; and the church went further, and suppressed a large number of them, or transferred their observance to the next Sunday. (See Dalloz, vol. 29, Tit. "*Jour ferie*," and 2d *Campeaux droit civil*, page 168.)

The same observance of these festivals was required by the ecclesiastical authorities as that which was due to Sunday. Men were

Richardson v. Goddard.

forbidden to labor or to follow their usual business or employments. But to this rule there were many exceptions of persons and trades, who were not subjected to such observance.

Without enumerating all the exceptions, we may mention that, by the canon law, the observance of these days did not
 * extend "to those who sold provisions; to posts or [* 42] public conveyances; to travellers; to carriers by land or water; *to the lading and unlading of ships engaged in maritime commerce.*"

Thus we see that in those countries where these holidays had their origin, and the sanction both of church and state, they were not allowed to interfere with the necessities of commerce, or to extend to ships, or those who navigate them. And it would certainly present a strange anomaly, if this country, in the nineteenth century, should be found re-establishing the superstitious observances of the dark ages with *increased rigor*, which both priest and sovereign in the seventeenth have been compelled to abolish as nuisances.

In England and other Protestant countries, while a more strict observance of the Lord's day is enforced by statute, the other fasts and festivals enjoined by the church have never been treated as coming within the category of compulsory holidays. Every man is left free to follow the dictates of his conscience in regard to them. Formerly their courts sat even on Sunday; nor were contracts made on that day considered illegal or void till the statute of 29 Charles 2d, c. 27, was enacted, whereby "no person whatever is allowed to do or exercise any worldly labor or work of their callings on the Lord's day." But this prohibition was never extended, either by statute or usage, to other church fasts, festivals, or holidays. It is true that there are three days in the year, to wit, "Candlemas, Ascension, and St. John the Baptist," in which the courts do not sit, and the officers are allowed a holiday. But there is no trace of any decision by their courts that worldly labor was prohibited on those days, or any usage that ships should not be unladen and freight delivered and received on such days. These saints' days and church fasts or festivals are treated as voluntary holidays, not as Sabbaths of compulsory rest.

In the case of *Figgins v. Willie* (3 Blackstone, 1186,) where a public officer claimed a right of holiday on the feast day of St. Barnabas, Chief Justice De Gray says: "I by no means approve of these self-made holidays; the offices ought to be open." And in *Sparrow v. Cooper*, (2 Blackstone, 1315,) the

* same judge observes, in reference to the same day: [* 43]

The Bark Tangier.

"There is no prescriptive right to keep this as holiday. It is not established by any act of parliament. The boards of revenue, custom-house, and excise, may act as they please, and pay such compliment to their officers and servants as they shall judge expedient by remitting more frequently the hard labor of their clerks, but they are no examples for the court." And the Justices Gould and Blackstone severally observe: "My objection extends to all holidays, as well as St. Barnabas day."

It may be observed, in passing, that there, as well as here, the class of persons most anxious to multiply holidays were the public officers, apprentices, clerks, and others receiving yearly salaries.

It is a matter of history that the State of Massachusetts was colonized by men who fled from ecclesiastical oppression, that they might enjoy liberty of conscience, and that while they enforced the most rigid observance of the Lord's day as a Sabbath, or day of ceremonial rest, they repudiated with abhorrence all saints' days and festivals observed by the churches of Rome or of England. They "did not desire to be again brought in bondage, to observe days and months, and times and years." And while they piously named a day in every year which they recommended that christians should spend in fasting and prayer, they imposed it on no man's conscience to abstain from his wordly occupations on such day, much less did they anticipate that it would be perverted into an idle holiday. The proclamation of the governor is but a recommendation. It has not the force of law, nor was it so intended. The duties of fasting and prayer are voluntary, and not of compulsion, *and holiday is a privilege, not a duty*. In almost every State in the Union a day of thanksgiving is appointed in the fall of the year by the governor, because there is no ecclesiastical authority which would be acknowledged by the various denominations. It is an excellent custom, but it binds no man's conscience or requires him to abstain from labor. Nor is it necessary to a literal compliance

with the recommended fast day that all labor should cease, [* 44] and the day be observed *as a Sabbath, or as a holiday.

It is not so treated by those who conscientiously observe every Friday as a fast day.

III. Does the testimony in this case show that from time immemorial there has been a well-known usage, having the force and effect of law in Boston, which requires all men to cease from labor, and compels vessels engaged in foreign commerce to cease from discharging their cargoes, and hinders consignees from receiving them?

We do not know this fact judicially, for (except in this case)

Middleton v. McGrew.

there is no judicial decision, or course of decisions, in Massachusetts, which establishes the doctrine that carriers must cease to discharge cargo on this day in the port of Boston, but rather the contrary. And after a careful examination of the testimony, we are compelled to say that we find no sufficient evidence of such a peculiar custom in Boston, differing from that of all other commercial cities in the world.

The testimony shows this, and no more: That some persons go to church on that day; some close the windows of their warehouses and shops, and either abstain from work or do it privately; some work half the day, and some not at all. Public officers, school-boys, apprentices, clerks, and others who live on salaries, or prefer pleasure to business, claim the privilege of holiday, while those who depend on their daily labor for their daily bread, and cannot afford to be idle, pursue their occupations as usual. The libelants appear to have had no conscientious scruples on the subject, as they received goods from other ships, and some from this. But the testimony is clear, that however great the number may be who choose to convert the day into a voluntary holiday for idleness or amusement, it never has been the custom that vessels discharging cargo on the wharves of Boston ceased on that day; that like the canon law regarding church festivals and holidays of other countries and former ages, the custom of Boston (if it amount to anything more than that every man might do as he pleased on that day) did not extend to vessels engaged in foreign commerce, or forbid the carrier to continue the delivery of freight on that day.

On the whole, we are of opinion that the barque *Tan-gier* * has made good delivery of her cargo to the con- [* 45] signees according to the exigency of her bill of lading, and that the decree of the circuit court should be reversed, and the libel dismissed with costs.

REUBEN MIDDLETON, Plaintiff in Error, v. WILLIAM MCGREW.

23 H. 45.

TEXAS LAND LAW—ALIENAGE.

It is the well-settled doctrine of the courts of Texas that, prior to the separation from Mexico, aliens to that country could not inherit lands of their deceased kin dying in Mexico; and this court must follow those decisions as the rule governing titles to real property in that State.

WRIT of error to the district court for the eastern district of Texas. The facts are sufficiently stated in the opinion.

Mr. Hughes, for plaintiff in error.

Mr. Ballinger, for defendant.

[* 47] *Mr. Justice CAMPBELL delivered the opinion of the court.

This action was instituted for the recovery of land in the colony of Power and Hewetson, in Texas, in the possession of the defendant, and claimed by the plaintiff through a conveyance by brothers of Joshua Davis, deceased, a colonist, who died in June, 1835, intestate, and without issue. These brothers were citizens of the United States, and assumed to be the heirs-at-law of the decedent. The only question presented for the examination of this court is, whether the brothers were capable of taking by inheritance real property within the limits of Mexico, or were they disabled by their condition as aliens? The solution of this question must be found in the jurisprudence of Mexico, as it is understood and applied to cases as they have arisen within the State of Texas. If there is found in the decisions of the supreme court of that State clear and consistent testimony to the existence of a rule of descent, under such circumstances, the duty of this court will be performed in ascertaining and enforcing that rule in this case.

The defendant has referred the court to a series of decisions as containing such testimony.

The case of *Hollomon v. Peebles*, 1 Texas R. 673, was that of heirs claiming the land of a colonist in the settlement of Austin, who after his location had returned to the United States and died, leaving heirs who were citizens of them. The court intimate, that by the laws of Spain, as adopted in Mexico, these heirs had no heritable blood, and proceed to say: "Whatever may be the true

construction of the laws of Spain or of colonization on [* 48] the subject matter, there can be * no doubt that the capacity of aliens to hold lands in the republic of Mexico, if it ever existed under the laws of Spain, was extinguished by the decree of the 12th March, 1828." (4 vol. Ordenes y Decretos, p. 155.) The sixth article of this decree is expressed in the following terms, viz:

"Foreigners introduced and established in conformity with the regulations now prescribed, or which shall be hereafter prescribed, are under the protection of the laws, and enjoy the civil rights conferred by them upon Mexicans, with the exception of acquiring landed rural property, which, by the existing laws, those not naturalized cannot obtain. * * * This provision covers all acquisitions of real property, whether by purchase or inheritance, and is so understood by the Mexican editor of *Murillos de Testamentos*."

Oelricks v. Ford.

The case of *Yates v. Iams*, 10 Tex. R. 168, was that of a citizen of the United States claiming through an ancestor who had died in 1827 in Texas, holding land by a head-right acquired in 1824. The court announce their conclusion, "that, upon general principles pervading the law of 1823, under which this grant was made, and upon the general policy of the government in relation to the right of property in lands (granted for the purpose of colonization) at the time of the death of the intestate, an heir domiciliated out of the republic of Mexico could acquire no right by inheritance to lands of persons dying in the province of Texas."

The case of *Hornsby v. Bacon*, 20 Texas R. 556, was that of citizens of the United States claiming to share as heirs in the real property of a citizen of Texas, who died in 1835, with other relations of the same degree, who were citizens of Texas. The court say: "The right of the plaintiff's vendors (the alien heirs) to claim this land by inheritance must be tested by laws anterior to the constitution of the republic; and by them, as appears from our previous decisions, such right cannot be sustained. The plaintiff can claim nothing through them by his conveyance."

The case of *Blythe v. Easterling*, 20 Texas R. 565, is that of heirs claiming the landed estate of an immigrant to Texas, who died in November, 1833, they being aliens and non-residents.

* The court decide, "that it is too well settled by repeated [* 49] decisions of this court to be longer regarded as an open question, that at the period of the death of the decedent, his heirs, being aliens, could not inherit his estate."

We understand these decisions to declare a law of descent applicable to the landed property of Texas generally, and not to lands in a particular colony, or settled under a particular act of colonization. The case before the court falls within the control of these decisions.

The judgment of the district court is affirmed.

HENRY OELRICKS and GUSTAV W. LURMAN, Plaintiffs in Error, v.
BENJAMIN FORD.

23 H. 49.

CONSTRUCTION OF CONTRACT—USAGE—MARGINS.

1. In a suit or contract to deliver flour in definite quantities on seller's option, within defined limits as to time, at a fixed price, proof of a usage in that market to demand margins of the seller as security for delivery, and his refusal to comply with such a demand, is inadmissible.

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2. Such a usage is inconsistent with the contract, because it adds a term or condition not found in the written agreement.
3. If such a usage were admissible, there is no such evidence of its general recognition in this trade as should be submitted to the jury.
4. Nor can it be shown that there was a parcel understanding that the contract was subject to such a usage.
5. Where the agreement shows that the contract with the agent was for his principal, whose name and residence is disclosed in the writing, the right of the principal to sue on it cannot be denied on the ground that he resided in another State, and the defendants looked to the agent alone in the matter.

WRIT of error to the circuit court for the district of Maryland.
The case is sufficiently stated in the opinion.

Mr. Frick and *Mr. Benjamin*, for plaintiffs in error.

Mr. Brown and *Mr. Brune*, for defendant.

[* 59] * Mr. Justice NELSON delivered the opinion of the court.
This is a writ of error to the circuit court of the United States for the district of Maryland.

The suit was brought by Ford against the defendants in the court below upon the following contract:

BALTIMORE, November 7, 1855.

For and in consideration of one dollar, the receipt whereof is hereby acknowledged, I have this day purchased from J. W. Bell, agent for Benjamin Ford, New York, for account of Oelricks & Lurman, Baltimore, ten thousand barrels superfine Howard Street or Ohio flour, deliverable, at seller's option, in lots of five hundred barrels, each lot subject to three days' notice of delivery, and payable on delivery, at the rate of nine dollars and twenty-five cents per barrel, viz:

[* 60]	* 2,000 barrels, seller's option, all December, 1855.
4,000	" " " January, 1856.
4,000	" " " February, 1856.
<hr/>	
10,000	

L. E. BALLARD, *Broker*.

Approved:

OELRICKS & LURMAN.

The 2,000 barrels deliverable in December were delivered, accepted, and paid for, as per contract. The 4,000 barrels to be delivered in each of the months of January and February were duly tendered to the defendants, and payments demanded, and which were refused.

Oelricks v. Ford.

The only objection to the acceptance of the flour at the time tendered was the refusal of Ford to a demand made upon his agent to deposit \$5,000 in one of the banks in Baltimore to secure the punctual delivery of the flour at the time mentioned. This demand for a deposit of money was denied by the plaintiff, on the ground that the contract contained no such stipulation.

After much testimony given by both parties on the trial, on the subject of a usage among the dealers in flour in the city of Baltimore to demand on time contracts a deposit of money, (or margin, as it is called,) and the right to rescind the contract if refused, the court charged the jury, that if they shall find, from the evidence, the defendants entered into the contract given in evidence, and that the plaintiff offered to deliver the flour therein mentioned according to its terms, and that when the offer was made he had the requisite quantity of flour to comply with the contract, and could have delivered it if the defendants had been willing to receive it, and that they had refused, then the plaintiff was entitled to recover. The court further instructed the jury, that the rule of damages was the difference between the contract price of the flour and the market value in the city of Baltimore on the several days of the tenders, with interest on this sum, in the discretion of the jury. The jury found for the plaintiff.

* One of the principal grounds of objection to the ruling [* 61] of the court is, its refusal to submit the question of usage, which was the subject of evidence on the trial, to the jury.

The witnesses introduced by the defendants to prove the usage speak in a very qualified manner as to its existence, as well as to the instances in which they have known it to have been adopted or acquiesced in; and all of them admit they have no knowledge that it was general among the dealers. Some of them state that they recognized and had acted upon a custom in their own business, under which either party to the contract might require a margin to a reasonable amount, to be put up to secure the performance, and that the contract might be rescinded, if the party refused; that they could not say such was the general custom; that different persons have different customs; some consider there is such a usage, and some do not. One witness states that he had at all times in his business considered it to be a right which might be exercised by either party to a time contract, whenever he apprehended a risk; that if the party was solvent, he supposed there was no right to demand it; another, that in his business he had always considered such contracts to be subject to the right of either party to demand the margin; that the occasion of exercising it was rare, as contracts

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made by his house were made with responsible persons; that he did not know that this was a general usage in Baltimore. The broker who negotiated the contract for the defendants states that he considered it a clearly understood right of both parties to such contracts to demand a margin to a reasonable amount; that he entertained the belief, from conversations with various merchants on the subject; that he recollected but one instance where, when the demand was made, the margin was put up, which was a margin of twenty-five cents on the barrel in a contract for 500 barrels.

There were ten witnesses, flour merchants for many years in the city, who state that they knew of no such usage.

It will thus be seen, from a careful analysis of the evidence, that the defendants wholly failed to prove any general or established usage or custom of the trade in Baltimore, as claimed in the defense. Every witness called on their behalf fails to [* 62] * prove facts essential to make out the custom in the sense of the law; on the contrary, most of them expressly disprove it. They express opinions upon the subject of a margin as a right to be exercised in their own business, but admit that it is not founded upon any general usage; and none of them speak of its having been claimed or exercised in his own business but in one or two instances. Whether a usage or custom of the kind set up existed in the trade in Baltimore, was a question of fact to be proved by persons who had a knowledge of it from dealing in the article of flour. Opinions of persons as to what rights they might exercise in their own business in respect to time contracts fall far short of any legal proof of the fact, especially when they admit that there was no general usage of the kind known to them.

Then, as to the precise limit or character of the custom claimed, the opinions of the witnesses are various and indefinite. The margin, they say, must be reasonable, but the pretended usage contains no rule by which a reasonable margin may be determined. It is said the amount may be referred to merchants. But there is no evidence that this is a part of the custom, or that any such mode of adjusting it ever occurred in the trade. Some of the witnesses state, that the margin must be a sum of money sufficient to make the party safe according to the state of the market. One states, that at the time the demand was made in this case for a margin, flour had fallen, and the price lower than the price in the contract; yet this, in his judgment, did not affect the right to make the demand, as the general opinion among dealers was, that the price would advance; that there were great fluctuations in the price, and that, in such a condition of things, a reasonable margin would

depend upon the extent and character of the fluctuations, and upon the speculative ideas of the future value of flour.

The broker of the defendants, who purchased this flour, states his view of the reasonableness of the margin, which is the difference between the intrinsic value of the flour and its speculative value; by intrinsic value, he says he means the cost of the production; and by speculative value, the price at * which [* 63] it was rating above its intrinsic value; and to a question what, in his opinion, would be a reasonable margin under the custom, when flour in the market was lower than the contract price, he answered, that he considered the demand reasonable in this case, because he believed flour was going up to twelve dollars per barrel. It would be difficult to describe a custom more indefinite and unsettled.

But, independently of the total insufficiency of the evidence to establish the usage, we are satisfied, if it existed, the proof would have been inadmissible to affect the construction of the contract. This proof is admissible in the absence of express stipulations, or where the meaning of the parties is uncertain upon the language used, and where the usage of the trade to which the contract relates, or with reference to which it was made, may afford explanation, and supply deficiencies in the instrument. Technical, local, or doubtful words may be thus explained. So where stipulations in the contract refer to matters outside of the instrument, parol proof of extraneous facts may be necessary to interpret their meaning. As a general rule, there must be ambiguity or uncertainty upon the face of the written instrument, arising out of the terms used by the parties, in order to justify the extraneous evidence, and, when admissible, it must be limited in its effect to the clearing up of the obscurity. It is not admissible to add to or engraft upon the contract new stipulations, nor to contradict those which are plain. (2 Kent Com. p. 556; 3 *ib.* p. 260, and note; 1 Greenl. Ev. sec. 295; 2 Cr. and J. 249, 250; 14 How. 445.)

Applying these principles to the contract before us, it is quite clear that the proof of the usage attempted to be established was inadmissible, and should have been rejected. There is no ambiguity or uncertainty in its terms or stipulations, and the condition sought to be annexed was not by way of explanation or interpretation, but in addition to the contract. The plaintiff agrees to deliver a given number of barrels of flour on certain days, at the price of \$9.25 per barrel, in consideration of which the defendants agree to receive the flour, and pay the price. This is the substance of the written contract. But the * defendants [* 64] insist, that besides the obligations arising out of the writ-

ten instrument, the plaintiff is under an additional obligation to give security, whenever called upon, for the faithful performance; and this, by the deposit in bank of the sum of \$5,000. The written instrument bound only the personal responsibility of the plaintiff; the parol evidence seeks to superadd, not a responsible name, as a surety, but in effect the same thing, a given sum of money. The parol proof not only adds to a written instrument, but is repugnant to the legal effect of it.

It was also urged on the argument that this contract was entered into between the defendants and the agent of the plaintiff, with the understanding at the time that it should be subject to the usage; but the answer to this is, that no such usage existed; and if it did, the terms of the contract exclude it. Any conversations and verbal understanding between the parties at the time were merged in the contract, and parol evidence is inadmissible to engraft them upon it.

We are satisfied the court below was right in excluding the consideration of the evidence of the usage from the jury: 1, because the usage was not proved; and 2, if it had been, it was incompetent to vary the clear and positive terms of the instrument.

An objection has been taken on the argument, which was not presented to the court below, but which, it is insisted, is involved in the exception to the charge; and that is, inasmuch as it appears upon the evidence that the plaintiff was a resident of New York, and the contract made at Baltimore, in the State of Maryland, by an agent, the presumption of law is, that the credit was given exclusively to the agent, the principal being the resident of a foreign State; and hence, that the contract, in legal effect, was made with the agent, and not with the principal, and the former should have brought the suit.

This doctrine is laid down by Judge Story in his work on agency, and which was supposed to be the doctrine of the English courts at the time, and founded upon adjudged cases. (Story on [* 65] Agency, sec. 268 and note; secs. 290, 423.) It did * not however, at the time receive the assent of some of the courts and jurists of this country. (2 Kent's Com. pp. 630, 631, and note; 22 Wend. p. 224; 3 Hill. 72.) And the doctrine has recently been explained, and Judge Story's rule rejected, by the English courts. In the case of *Green v. Kope*, (36 Eng. L. and Eq. R. pp. 396, 399, 1856,) the court denied that there was any distinction, as it respected the personal liability of the agent, whether the principal was English or a foreigner. The chief justice observed: "It is in all cases a question of intention from the contract, explained by the surrounding circumstances, such as

The Dubuque and Pacific Railroad Co. v. Litchfield.

the custom or usage of the trade when such exists. No usage," he observes, "was proved in the present case, and I believe none could have been proved." Again, he observed: "It would be ridiculous to suppose that an agent, for a commission of one-half per cent., is to guaranty the performance of a contract for the shipment of 1,000 barrels of tar." The case was finally put upon the intent of the parties, as derived from the construction of the contract, and which was, that the defendant contracted only as agent, and not to make himself personally liable. Willes, J., doubted if evidence of custom was admissible to qualify the express words of the contract, so as to make the agent liable.

(See also 14 Com. B. R. p. 390; *Mahoney v. Kekule*, 5 Ellis and Black, pp. 125, 130.)

In the present case, the broker's note, and which is approved by the defendants, affixing the firm name, is too clear upon the face of it to admit of doubt as to the person with whom the contract was made. The purchase is from "J. W. Bell, agent for Benjamin Ford, of New York," and the case shows that Bell had full authority. The name of the principal is disclosed in the contract, and the place of his residence, as the person making the sale of the flour, through his agent. This fixes the duty of performance upon him, and exonerates the agent.

The judgment of the court below affirmed.

THE DUBUQUE AND PACIFIC RAILROAD COMPANY, Plaintiff in Error, v.
EDWIN C. LITCHFIELD.

23 H. 66.

CONSTRUCTION OF DES MOINES RIVER LAND GRANT.

By the act of August 8, 1846, congress granted to the territory of Iowa, "for the purpose of aiding said territory to improve the navigation of the Des Moines river from its mouth to the Raccoon fork, so-called, in said territory, one equal moiety in alternate sections of the public lands, (remaining unsold and not otherwise disposed of, incumbered, or appropriated,) in a strip of five miles in width on each side of said river, to be selected within said territory by an agent or agents to be appointed by the governor thereof, subject to the approval of the secretary of the treasury of the United States." The mouth of the Raccoon fork is about midway of the course of the Des Moines river in that territory: Held, that the grant did not include any lands above the mouth of the Raccoon fork, and that notwithstanding the approval of the secretary, and the patent of the State for lands above said fork, the title so acquired was void.

THIS is a writ of error to the circuit court for the district of Iowa.

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The case turned wholly upon a construction of the grant, the operative words of which are given in the syllabus.

It was argued by *Mr. Platt Smith*, for the plaintiff in error, and by *Mr. Charles Mason*, for the defendant.

The attorney general, *Mr. Black*, was heard on behalf of the United States, on the ground that the government was interested largely in the construction which the court should give as to the extent of the grant.

[* 83] * *Mr. Justice CATRON* delivered the opinion of the court.

The land in controversy lies within five miles of the Des Moines river, and within the limits of what was the Iowa territory when the act of congress of 1846 was passed, making the grant to improve the navigation of the Des Moines river from its mouth to the Raccoon fork; but the land sued for lies nearly sixty miles above the mouth of that fork.

Litchfield, the plaintiff below, claims by virtue of a title derived from the State of Iowa, acting as trustee of the Des Moines river fund.

The Dubuque and Pacific Railroad Company is in possession of the section of land, under a grant from congress for the purpose of constructing a railroad from Dubuque, on the Mississippi river, to a point on the Missouri river near Sioux city. This grant was made to the State of Iowa in 1856, and is for every alternate section, (designated by odd numbers,) for six sections in width on each side of the road. The road was located, the lands designated by the United States, and accepted by Iowa; and then they were transferred to the railroad company by the legislature of that State. The section in dispute is one of those vested in the railroad company. This is the younger and inferior title, if the first

[* 84] grant for *improving the river extends along its whole length; and the material question in this case is, whether the grant made by the act of congress of August 8th, 1846, for the river improvement, is limited to lands lying next the river, and below the Raccoon fork. And although this depends on a true construction of the act, still it becomes necessary to give a brief *historical* statement of the proceedings before the executive department respecting this claim, extending through more than ten years; these proceedings being relied on, either to conclude the title, or to control the construction of the act of congress.

They are as follows: By the act of congress approved August 8th, 1846, a grant of land was made to the territory of Iowa "for the purpose of aiding said territory to improve the navigation of

the Des Moines river from its mouth to the Raccoon fork, in said territory, one equal moiety, in alternate sections, of the public lands (remaining unsold and not otherwise disposed of, incumbered, or appropriated,) in a strip five miles in width on each side of said river, to be selected *within said territory*, by an agent to be appointed by the governor thereof, subject to the approval of the secretary of the treasury of the United States."

The 4th section of that act provides that the lands shall become the property of the State of Iowa on her admission into the Union, which was very soon expected to occur. The governor of Iowa was notified by the commissioner of the general land office of this act, soon after its passage, viz: October 17, 1846, by letter, in which it is stated that, "under the grant, the territory is entitled to the vacant lands, in alternate sections, within five miles on each side of the Des Moines river, from the northern boundary of Missouri to the Raccoon fork."

No objection to this construction was then made by the State authorities, and the agent of the State proceeded to make the selections within the limits above stated.

No question as to the extent of this grant arose until nearly two years after. It appears, however, that a letter dated February 23d, 1848, from Commissioner Young, did not adhere

* to the restrictions mentioned in the first letter, but its [* 85] terms seemed to concede to it a greater extent. And in 1849 this question was brought to the attention of the secretary of the treasury, by the delegation of the State in congress; they claiming that the State was entitled to land along the whole course of the river to its source. In reply, (March 2d, 1849,) the secretary, Mr. Walker, expresses an opinion that the "grant extends on both sides of the river from its source to its mouth, but not into lands on the river in the State of Missouri." This opinion conceded that *nine hundred thousand acres* above the Raccoon fork was within the grant.

In conformity with this view of Mr. Walker, selections of lands above the fork were reported by the commissioner of the general land office, for confirmation, to the secretary of the interior, Mr. Ewing, the supervision of the public lands having passed from the treasury to the interior department. Mr. Ewing, upon the ground that the opinion of Mr. Walker had not been carried into effect, held that the same was open for revision, and, not concurring therein, refused to approve the selections; but, as congress was then in session, and might "extend the grant," ordered a suspension of action in the matter.

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From this decision of Mr. Ewing an appeal was taken in 1850 to the President, by whom the matter was referred to the attorney general, Mr. Johnson, who, in his opinion of July 19, 1850, construed the grant as extending above the Raccoon fork.

No action appears to have been taken under this opinion of Mr. Johnson, and the question remained open at the accession of the next President, Mr. Fillmore, when it was submitted to the attorney general, Mr. Crittenden, who, on the 30th June, 1851, replied that the letter of Mr. Walker had no binding effect on his successor, being but an opinion expressed, not an act done; that the opinions of attorneys general are merely advisory, and that the grant, in his opinion, was limited to the lands below the fork. In this opinion it appears that Mr. Stuart (then secretary of the interior) concurred; but afterwards—on the 29th October, [* 86] 1851—he addressed the *commissioner of the general land office on the subject, and directed the selections above the Raccoon fork to be reported for his approval, for the reasons and upon the conditions therein stated, viz, “that the question involved partakes more of a judicial than of an executive character, which must ultimately be determined by the judicial tribunals of the country.” In conformity with this decision, lists of lands above the fork were submitted by the commissioner in October, 1851, and March, 1852, and approved by Mr. Stuart, in accordance with the views expressed in his letter of the 29th October, 1851. Acting under this authority, the commissioner, in 1853, submitted lists to Secretary McClelland also, which were approved. The subject was again brought before the secretary of the interior in 1856, and by him referred to Attorney General Cushing. Mr. Cushing, in his reply of 29th May, 1856, advised that a proposition set forth by him be submitted to the State for a final adjustment of the matter. This proposition was not accepted by the State; and in 1858 the subject was laid before Attorney General Black, whose opinion clearly restricted the grant to the river below the Raccoon fork, that being in accordance with the construction originally given to it at the general land office. On mature consideration, we are of opinion that the title of neither party has been affected by the proceedings in the land office, or by the opinions of the officers of the executive department, but that the claims of the parties under the two acts of Congress must be determined by the construction to be given to those acts. This we are required to do in deciding this cause.

The caption of the act of 1846 informs us that the donation was made to aid in the improvement of the navigation “of the Des

Moines river," and the body of it grants to the territory (and State) alternate sections, to improve the navigation "of the Des Moines river, from its mouth to the Raccoon fork," in a strip five miles in width on each side of "*said river*." And we are further told, (section 3d,) that "the said river Des Moines shall forever remain a public highway for the use of the government of the United States, free from any toll or other charge whatever for any property of the United States, * or persons [* 87] in their service, passing through or along the same."

What *navigable river* was to be improved, and was in the contemplation of congress in 1846, when the northern portion of Iowa was a wilderness? Surely not the small streams and brooks reaching into Minnesota territory, as is here claimed.

Congress recognized the Des Moines river, over which a free passage was secured, to be a stream emptying into the Mississippi; and from its mouth to the Raccoon fork was the "*said river*," on each side of which the strip of land granted was to lie.

As proof of which, we refer to the following facts: The bill was introduced into the House of Representatives by Mr. Dodge, the delegate from Iowa territory, and was the subject of a report by the committee on public lands, which report is a document in the case agreed, and the facts therein stated are admitted. Among these facts, it appears (by a previous report of Captain Fremont, who had officially explored the Des Moines river) that from its mouth to the Raccoon fork was two hundred and three miles; that it presented no obstacles to navigation that could not be overcome, at a slight expense, by the removal of loose stones at some points, and the construction of artificial banks at some few others, so as to destroy the abrupt bends, and that this was all that would be required to render it navigable; that the variable nature of the bed and the velocity of the current would keep the channel constantly clear.

The committee's report states that the country is occupied and cultivated as high up as the Raccoon fork; and that a clear and uninterrupted navigation could be secured at an expenditure not great when compared with the object; that the land appropriated by the bill is similar in its character and object to many grants already made by Congress for other western territories and States, and at the same time less in quantity; but it is believed that it will be sufficient to accomplish the desired improvement; and as evidence of this, Captain Fremont's statement is relied on. The committee was, however, of the opinion, that locks and dams might be required at some of the ripples.

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[* 88] *Accompanying this report, and as a part of it, is a letter from the commissioner of the general land office, obtained by Mr. Dodge, (dated May 5th, 1846,) in which it is officially stated, "That the amount of unsold land within five miles on each side of the Des Moines river, from its mouth to the Raccoon fork, *proposed* to be granted to the territory of Iowa by House bill No. 106, is estimated at 261,000 acres." The bill No. 106 as reported, was passed into the law before us. When we carry with us the fact that the 261,000 acres of land were surveyed, and the plats recorded in the general land office, to which surveys the commissioner's letter referred, it is plain that the river, from its mouth to the Raccoon fork, was in the view of congress, as manifestly as if the outlines of the tract (or strip) had been given by a plan in connection with the river. Of this we have no doubt; but if we had doubts from any obscurity of the act of congress, a settled rule of construction would determine the controversy. All grants of this description are strictly construed *against* the grantees; nothing passes but what is conveyed in clear and explicit language; and as the rights here claimed are derived entirely from the act of congress, the donation stands on the same footing of a grant by the public to a private company, the terms of which must be plainly expressed in the statute; and if not thus expressed, they cannot be implied. *Charles River Bridge v. Warren Bridge*, 11 Peters, 420.

We concur with the following citation and reasoning of the plaintiff's counsel, to wit: Lord Ellenborough, in his judgment in *Gildart v. Gladstone*, 1 East. 675, (an action for Liverpool dock dues,) says: "If the words would fairly admit of different meanings, it would be right to adopt that which is more favorable to the interest of the public, and against that of the company, because the company, in bargaining with the public, ought to take care to express distinctly what payments they are to receive, and because the public ought not to be charged unless it be clear that it was so intended."

"The reason of the above rule is obvious—parties seeking grants for private purposes usually draw the bills making them. If

they do not make the language sufficiently explicit and
[* 89] *clear to pass everything that is intended to be passed, it is their own fault; while, on the other hand, such a construction has a tendency to prevent parties from inserting ambiguous language for the purpose of taking, by ingenious interpretation and insinuation, that which cannot be obtained by plain and express terms."

The second ground relied on in support of Litchfield's title is,

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that he is an innocent purchaser from the State of Iowa of land conceded to belong to the improvement fund by the officers and agents of the United States; and having been certified as part of the grant, and as being one of the odd sections belonging to Iowa, the principal is bound by the acts of his agents, and that these binding acts cannot be revoked at the pleasure of the secretary of the interior, as is here assumed to be done.

We have set forth the proceedings on this claim, and have already expressed the opinion that the courts of justice are not concluded by them. The principal reason, however, why the conveyance to Litchfield, under the river improvement grant, cannot be upheld, is this: The act of congress was a direct grant to Iowa in fee of an undivided moiety of the whole tract lying on each side of the river from the Raccoon fork to the Missouri line. Congress had the undoubted power to make the grant and vest the fee.

No authority was conferred on the executive officers administering the public lands to do more than make *partition* between the tenants in common, Iowa and the United States, in the manner prescribed by the act of congress.

The premises in dispute lie sixty miles beyond the limits of the tract granted; it was therefore impossible to make partition, under this grant, of lands lying outside of its boundaries; and all attempts to do so were merely nugatory. It follows that the plaintiff below has no title, and his action must fail.

The attorney general has intervened, and insists that this action is a mere fiction, and was intended to draw from this court an opinion, affecting the rights of the United States and others, the parties to this suit having nothing at stake, and that the case should be dismissed.

* To meet this imputation of contrivance, the parties [* 90] and their counsel have filed affidavits and statements, from which it satisfactorily appears that the action was brought by a *bona fide* claimant under the grantee of the river improvement fund against the railroad company; and although the case agreed was made up in a friendly spirit, nevertheless the object was to try the title, and this was done at the instance of some of the executive officers.

If the judgment of the district court were affirmed, the defendant below would lose the land; and it being reversed, the plaintiff below loses it. The action was obviously brought to carry out Secretary Stuart's suggestion, when he said, "That the question involved partakes more of a judicial than an executive character,

and must ultimately be determined by the judicial tribunals of the country."

We have therefore felt bound to hear and decide the cause on its merits; and finding that the plaintiff below has no title, we direct that the judgment of the district court be reversed, and the cause remanded; and that court is ordered to enter judgment for the defendant below.

GREEN'S ADMINISTRATRIX, Appellant, v. FLETCHER CREIGHTON, in his own right and as Executor of Jonathan McCaleb.

23 H. 90.

JURISDICTION OF CIRCUIT COURT—EFFECT OF PROCEEDING IN PROBATE COURT.

1. The circuit courts of the United States have jurisdiction, where the requisite citizenship is found to exist, to establish the claim of a plaintiff against the estate of a decedent, notwithstanding the pendency of probate proceedings in the State court to settle the estate under State laws.
2. The pendency of such proceedings in the probate court cannot be pleaded in abatement of the suit in the federal court.
3. Where a judgment at law has established the claim of a party against a decedent, the claimant can maintain a suit against said administrator and his sureties on the administrator's bond in chancery, where a discovery is necessary, or other equitable grounds of relief, without first obtaining judgment against the principal in the bond.

THIS was an appeal from the circuit court for the southern district of Mississippi.

The only question considered by this court was the jurisdiction of the circuit court as to the right to sue the sureties on the bond, and the effect of the existing proceedings in the probate court of the State of Mississippi, to wind up the estate of decedent as insolvent.

These matters are sufficiently stated in the opinion.

Mr. Freeman, for appellant.

Mr. Yerger and *Mr. Wharton*, for appellee.

[* 104] * Mr. Justice CAMPBELL delivered the opinion of the court.

The intestate of the plaintiff, as an heir of Wheeler Green, deceased, and claiming, by assignment of the remaining heirs, the entire estate, filed this bill against the defendant, in his capacity of administrator of Amos Whiting, deceased, and of executor of the will of Jonathan McCaleb. He states, that Albert Tunstall became the administrator of the estate of Wheeler Green by the appointment of the court of probate of Claiborne county, Mis-

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Mississippi, in 1836; that he gave bond for the faithful performance of his duties, with Amos Whiting as his surety; that Tunstall received a large amount of property belonging to the estate, and committed a *devastavit*; that in the year 1841, his intestate summoned Tunstall before the probate court to make an account, and upon that accounting he was found to be indebted to him, as heir, sixty-one thousand one hundred and ninety-four $\frac{78}{100}$ dollars; which sum he was required to pay by the decree of the court, and authority was given to prosecute a suit on the administration bond. The bill avers that Tunstall and Whiting, his surety, are both dead, and that all of his other sureties are insolvent. It charges that the defendant, Creighton, as administrator of Whiting, has assets in his hands for administration, and that a portion of the assets is in the hands of McCaleb, who is the surety of Creighton on his bond to the probate court, as administrator of Whiting.

The object of the bill is to establish the claim of the intestate and his representative, arising from the judgment against *Tunstall and the breach of his administration bond, on [* 105] which Whiting is a surety, against the administrator of Whiting and his surety, and to obtain satisfaction from them to the extent of the assets in their hands belonging to that estate, and for this purpose they seek a discovery of the assets, and account and payment.

The defendants appeared to the bill, and allege that the estate of Whiting has been regularly administered, and that returns have been made to the probate court of Claiborne county, Mississippi, of whatever property came to the hands of the administrator, Creighton, whose character as administrator is admitted, and that he was then engaged in administering the estate under the laws of Mississippi; that the estate had been reported to the probate court as insolvent several years before this suit was instituted, and that commissioners had been appointed by that court to receive and credit the claims; which commission was still open for the proof of claims. They contest the validity of the judgment recovered against Tunstall, and the truth of the account preferred against them, and deny the jurisdiction of the circuit court to entertain this bill. The connection of McCaleb with the bond of Creighton is admitted, and also that a portion of the money of the estate of Whiting had been deposited with or lent to him. Upon the hearing of the cause on the pleadings and proofs, the bill was dismissed for want of jurisdiction, and by the agreement of the parties the record has been made up so as to present that question only. None other will, therefore, be considered. In the organization of the courts of

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the United States, the remedies at common law and in equity have been distinguished, and the jurisdiction in equity is confided to the circuit courts, to be exercised uniformly through the United States, and does not receive any modification from the legislation of the States, or the practice of their courts having similar powers. *Livingston v. Story*, 9 Pet. 632.

The judiciary act of 1789 conferred upon the circuit courts authority "to take cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive [* 106] * of costs, the sum or value of five hundred dollars, and * * * the suit is between a citizen of the State where the suit is brought, and a citizen of another State."

The questions presented for inquiry in this suit are, whether the subject of the suit is properly cognizable in a court of equity, and whether any other court has previously acquired exclusive control of it. The court has jurisdiction of the parties. In the court of chancery, executors and administrators are considered as trustees, and that court exercises original jurisdiction over them, in favor of creditors, legatees, and heirs, in reference to the proper execution of their trust. A single creditor has been allowed to sue for his demand in equity, and obtain a decree for payment out of the personal estate without taking a general account of the testator's debts. *Attorney General v. Cornthwaite*, 2 Cox, 43; *Adams Eq.* 257. And the existence of this jurisdiction has been acknowledged in this court, and in several of the courts of chancery in the States. *Hagan v. Walker*, 14 How. 29; *Pharis v. Leachman*, 20 Ala. R. 663; *Spottswood v. Dandridge*, 4 Munf. 289. The answer of the defendant contains an assertion that, prior to the filing of the bill, the estate of Whiting was reported to the probate court of Claiborne county as insolvent, and thereupon that court had appointed commissioners to audit the claims that might be presented and proved, as preparatory to a final settlement, and that the commission was still open for the exhibition of claims.

But of this statement there is no sufficient proof. Neither the report nor any decretal order founded on it is contained in the record, and the proceedings referring to one are of a date subsequent to the filing of the bill.

The question arises, then, whether the fact of the pendency of proceedings in insolvency in the probate court will oust the jurisdiction of the circuit court of the United States. In *Suydam v. Brodnax*, 14 Pet. 67, a similar question was presented. A plea in abatement was interposed in the circuit court in Alabama, in an

action at law against administrators, to the effect that the decedent's estate had been reported as insolvent to a court of probate, and that jurisdiction over the *persons interested and [* 107] the estate had been taken in that court. This court declared that the eleventh section of the act to establish the judicial courts of the United States, carries out the constitutional right of a citizen of one State to sue a citizen of another State in the circuit court of the United States. "It was certainly intended," say the court, "to give to suitors having a right to sue in the circuit court remedies coextensive with those rights. These remedies would not be so, if any proceedings under an act of a State legislature to which a plaintiff was not a party, exempting a person of such State from suit, could be pleaded to abate a suit in the circuit court.

In *Williams v. Benedict*, 8 How. 107, this court decided that a judgment creditor in a court of the United States could not obtain an execution and levy upon the property of an estate legally reported as insolvent in the State of Mississippi to the probate court, and which was in the course of administration in that court. The court expressly reserve the question as to the right of a State to compel foreign creditors, in all cases, to seek their remedies against the estates of decedents in the State courts alone, to the exclusion of the jurisdiction of the courts of the United States.

The cases of *Peall v. Phipps*, 14 How. 368, and *Bank of Tennessee v. Horn*, 17 How. 157, are to the same effect.

The case of the *Union Bank v. Jolly*, 18 How. 503, was that of a judgment creditor who recovered a judgment against administrators, who subsequently reported the estate of their decedent insolvent. After administering the estate in the probate court, it was ascertained that there was a surplus in their hands. The creditor had not made himself a party to the settlement in the probate court; and the administrators contended that his claim was barred.

This was a suit in Mississippi. This court determined that the creditor had a lien upon the assets thus situated.

Thus it will be seen, that under the decisions of this court, a foreign creditor may establish his debt in the courts of the United States against the representatives of a decedent, notwithstanding the local laws relative to the administration and *settle- [* 108] ment of insolvent estates, and that the court will interpose to arrest the distribution of any surplus among the heirs. What measures the courts of the United States may take to secure the equality of such creditors in the distribution of the assets, as provided in the State laws (if any) independently of the administra-

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tion in the probate courts, cannot be considered until a case shall be presented to this court.

The remaining question to be considered is, whether the debt described in the bill entitles a plaintiff to come into a court of equity, under the circumstances. It is well settled, that no one can proceed against the sureties on an administration bond at law, who has not recovered a judgment against the administrator. 5 How. Miss. R. 638; 6 Port. 393. But this rule is not founded upon the supposition that there is no breach of the bond until a judgment is actually obtained. The duty of the administrator arises to pay the debts when their existence is discovered; and the bond is forfeited when that duty is disregarded. The jurisdiction of a court of equity to enforce the bond arises from its jurisdiction over administrators, its disposition to prevent multiplicity of suits, and its power to adapt its decrees to the substantial justice of the case. *Moore v. Walter's Heirs*, 1 Marsh. R. 488; *Moore v. Armstrong*, 9 Port. 697; *Carew v. Mowatt*, 2 Ed. Ch. R. 57.

In this case, the original debtor, Tunstall, has died insolvent. Whiting, his surety, has died insolvent. A portion of the assets belonging to the estate of the latter is in the hands of the surety of this administrator. A discovery of the amount and nature of the assets in hand, and their application to the payment of the debt, are required, if they are subject to the application.

We conclude that the circuit court was authorized to entertain this suit, and that the decree dismissing the bill is erroneous.

Decree reversed.

ALBERT H. CAGE and HENRY HAYS, Executors of Robert H. Cage, deceased, v. ALEXANDER A. CASSIDY and others.

23 H. 109.

RES ANJUDICATA—SURETY—ADMINISTRATOR.

A surety in an administration bond in Mississippi had a judgment rendered against him for default of his principal, and gave his note for the amount. Afterwards, in the courts of Tennessee, he brought a suit, in which his principals and the plaintiff in the first judgment were compelled to interplead, and in which suit a small sum was found due from the principal to plaintiff: Held, that this was a sufficient ground for the circuit court in Mississippi to enjoin the collection of the note given for the first judgment, as the liability of the surety could not exceed that of his principal, and because he had been induced to make no defense by false representations of the plaintiff in that judgment.

APPEAL from the circuit court for the southern district of Mississippi. The case is well stated in the opinion.

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Mr. Brent and Mr. Phelps, for appellants.

Mr. Bradley and Mr. McCalla, for appellee.

* Mr. Justice CAMPBELL delivered the opinion of the court. [* 113]

R. H. Cage, the testator of the appellants, filed his bill in the circuit court, to be relieved from a judgment rendered there in favor of the appellee, (A. A. Cassidy,) in November, 1852.

The pleadings and proofs contained in the record disclose that the testator, in 1841, became surety to the probate court of Madison county, Mississippi, for William Douglass and William Hall, on their bond, as administrators of the estate of Henry L. Douglass, deceased. In 1848, their letters of administration were revoked; and Cassidy, the husband of Mary Douglass, the widow of Henry L. Douglass, and the guardian of Henrietta Douglass, their only child, was appointed administrator *de bonis non*.

In 1849, the probate court cited the administrators to *account, and upon their non-appearance rendered a decree [* 114] against them for \$6,822.87, and subsequently ordered that payment should be made to Cassidy and wife and Henrietta Douglass—one moiety to each, being their legal share; and in default of payment authorized a suit on the administration bond. In 1850, suits were instituted on the bond against Cage, the surety, in the circuit court, by Cassidy and Henrietta Douglass; but no suit was commenced against the principals, who resided in Tennessee. Judgments were rendered in 1851 against Cage, for the amount of the decree; and these were settled by his giving a note to Cassidy for their amount, payable one year after date, and by paying the costs.

During the year 1851 Cage visited Tennessee, with a view to have a settlement between Douglass and Hall, his principals, and Cassidy, and to obtain an indemnity from those who had induced him to sign their bond. His negotiations were unproductive; and he filed a bill in the court of chancery, in Sumner county, Tennessee, to which Cassidy and wife, Henrietta Douglass, and Douglass and Hall, and others, were made parties.

In this bill he stated his relation as surety, and his legal claim to be exonerated from his obligation, and from his impending danger of loss. He insisted that his creditors, the distributees, and his principals, the administrators, should adjust their accounts, and that the balance should be settled. He charged that he had not made defense against the judgments in Mississippi, because the defendant, Cassidy, had assured him that he was not to be vexed or injured, and the suit was simply to serve as an instrument to

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bring his absent principals to a fair settlement. He charges that the account stated in the probate court was erroneous, within the knowledge of Cassidy, who had procured it, and that the balance was subject to credits that he knew to be just. He obtained an injunction against Cassidy, requiring him not to transfer his note or to commence any suit upon it pending the injunction.

The several defendants answered the bill; and in 1854 the cause came on for a hearing upon pleadings, proofs, orders, and a report upon the administration accounts.

[* 115] * Before this time the administrators had obtained a writ of error upon the judgment rendered in the probate court; and in January, 1853, this judgment was annulled by the court of errors and appeals of Mississippi.

The defendant, Cassidy, in 1852, notwithstanding the injunction in Tennessee, commenced a suit upon the note of the surety (Cage) in the circuit court, and in November, 1852, recovered a judgment for the full amount, and sued out execution for its collection. Thereupon Cage filed the bill for injunction and relief with which the proceedings in the cause before this court were commenced.

In this bill he charges that the account as stated in the probate court is unjust. That Cassidy was aware of the injustice of the charges when they were made. That he had quieted the mind of the plaintiff, by assurances that he meditated no harm to him; but merely expected to bring the administrators to a fair settlement by that course, and only expected to hold the claim against him for that purpose. He specifies the errors in the account, and the efforts he had made to bring the parties to a settlement, and the pendency of his suit in Tennessee. Cassidy answered the bill, taking issue upon some of the material averments.

Thus the cause stood when the court of chancery in Sumner county, Tennessee, rendered its final decree in 1854. The court declared that the settlement in the probate court, the judgments in the circuit court on the bond, and the execution of the promissory note by Cage in liquidation, were superinduced by the promises and assurances of Cassidy to Cage, that he was not to be held personally, but they were to be used to bring the principals to a fair accounting. That Cassidy knew that the statement of the account in the probate court was erroneous, and unjust to the administrators, and that the recovery of the judgment on the note of Cage was a breach of the injunction, and a fraud upon him.

The court finds that, instead of a debt of \$6,822.87, as reported against the administrators in 1849, there was only due the sum of \$850.37. It charges against this sum the costs paid by

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Cage in the litigation to which he has been subjected, *and required the remainder to be paid into court; and [* 116] thereupon entered a decree against Cassidy, enjoining him from proceeding further upon the judgment in the circuit court on the note.

This decree was presented to the circuit court in Mississippi, in suitable pleadings, and was considered by that court under a stipulation of the solicitors of the respective parties to this effect: "It is admitted that proof before the chancery court of Tennessee was sufficient to establish the state of accounts of Hall and Douglass, as administrators of H. L. Douglass, in Mississippi and Tennessee, as decreed by the chancellor in the Tennessee case, filed in this cause as an exhibit. This agreement is made, in order to dispense with obtaining a copy of the proof before the chancery court of Tennessee, or retaking the depositions of the witnesses. In other words, all that is intended to be admitted hereby, and that is admitted, is that the decree of said chancery court was supported by the proof."

Upon the hearing in the circuit court, that court determined that the injunction which had been granted in the preliminary stage of this cause was improvidently allowed, and that the bill must be dismissed. From this decree this appeal is taken.

The natural limit of the obligation of a surety is to be found in the obligation of the principal; and when that is extinguished, the surety is in general liberated. In some codes, the obligation of a surety cannot extend beyond or exist under conditions more onerous than that of his principal. The obligation of the administrators, Douglass and Hall, has been ascertained by the decree of the court of chancery of Tennessee, upon proof, conceded to be sufficient, and has been fully discharged by its order. Notwithstanding this, the appellee (Cassidy) seeks to enforce a judgment for nearly ten times the amount of the debt found to be due in that decree, and now discharged. It is apparent that the effort is unconscionable, and can only be allowed under the influence of some inflexible and imperious rule of the court, that deprives the appellants of any title to its interposition. But the court *of chancery of Tennessee, upon sufficient proof, has de- [* 117] clared that the surety had been "lulled into security" by the delusive promises of his creditor, and that he has been the victim of artifice and circumvention; that the judgment against him was obtained in contempt of the injunction of the court, and that the assertion of any right under it would be fraudulent. This decree remains in full force and effect.

These circumstances furnish additional motives for the intervention of the equitable powers of the court for the relief of the appellants.

It is the opinion of this court, that the decree of the circuit court is erroneous, and must be reversed. The cause is remanded, with directions to the circuit court to enter a decree perpetuating the injunction.

JOSEPH PENNOCK and NATHAN F. HART, Appellants, v. GEORGE S. COE, Trustee of the Cleveland, Zanesville, and Cincinnati Railroad Company.

23 H. 117.

MORTGAGE OF FUTURE ACQUIRED PROPERTY—RAILROAD BONDS.

1. A valid mortgage may be made to cover property to be acquired after the making of the mortgage; and a mortgage of a railroad, to be built thereafter, and rolling stock and other property appurtenant to such a road, attaches to the road and the rolling stock as they are built and acquired.
2. Such a mortgage is a valid superior lien to that of a subsequent mortgage of the same property and to judgment creditors, and the latter will be enjoined in equity from selling such property on execution.
3. The holders of a part of the bonds secured by such second mortgage have no right to appropriate to their sole benefit, by such execution and sale, the property mortgaged to secure *all* said bonds. In such case, equality is equity.
4. The act of the Ohio legislature, (under which the road from Hudson to Millersburg, mortgaged in this case, was built,) by its fair construction, authorized the road which the company built.

THIS was an appeal from the circuit court for the northern district of Ohio and the case is fully stated in the opinion.

Mr. Stanton, Mr. Spalding, and Mr. Parsons, for appellants.

Mr. Otis, for appellee.

[* 124] Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from a decree of the circuit court of the United States for the northern district of Ohio.

The bill was filed in the court below, by Coe, mortgagee of the road of the railroad company, in trust, for securing the payment of its bonds, to enjoin the execution of a judgment recovered at law against the company, by Pennock and Hart, two of the defendants.

The facts of the case are these: The Cleveland, Zanesville, and Cincinnati Railroad Co., created a body politic and corporate by the laws of Ohio, to make a railroad between certain termini in

that State, in pursuance of authority conferred by law, issued bonds to the amount of \$500,000, payable ten years from date, with interest at the rate of seven per cent., payable semi-annually, on the first day of April and October in each year, and, to secure the payment of the same, executed a mortgage of the railroad and its equipments to the complainant, in trust for the bondholders, the description of which is *in the words following: [* 125] "All the present and future to be acquired property of the parties of the first part; that is to say, their road, made or to be made, including the right of way, and the land occupied thereby, together with the superstructure and tracks thereon, and all rails and other materials used therein, or procured therefor, with the above-described bonds, or the money obtained therefor, bridges, viaducts, culverts, fences, depots, grounds and buildings thereon, engines, tenders, cars, tools, machinery, materials, contracts, and all other personal property, right thereto, or interest therein, together with the tolls, rents, or income, to be had or levied therefrom, and all franchises, rights, and privileges, of the parties of the first part, in, to, or concerning the same." At the time of the issuing of these bonds, and the execution of the mortgage, the railroad was in the course of construction, but only a small portion of it finished. It was constructed and equipped almost entirely by means of the funds raised from these bonds, together with a second issue to the amount of \$700,000. The road cost upwards of \$1,500,000. The stock subscribed and paid in, amounted only to some \$369,000.

The mortgage securing the payment of the second issue bears date the first of November, 1854, and was made to one George Mygatt, in trust for the bondholders, and the property described in and covered by it is the same as that described in the first mortgage. The road was finished to Millersburg, its present terminus south, in May, 1854, and the whole of the rolling stock was placed on it previous to the date of the second mortgage. This stock was purchased and placed on the road from time to time, as the locomotives and cars were needed in the progress of its construction.

The mortgage to the complainant contained a covenant on the part of the company, that the money borrowed for the construction and equipment of the road should be faithfully applied to that object, and that the work should be carried on with due diligence until the same should be finished.

In case of default in the payment of the principal or interest of the bonds, the trustee was empowered to enter upon and take possession of the road, or, at the election of a moiety * of [* 126]

the bondholders, to sell the same at public auction, and apply the proceeds to the payment of the bonds.

The defendants, Pennock and Hart, being the holders of sixteen of the bonds issued under the second mortgage, recovered a judgment on the same, May, 1856, against the railroad company, issued execution, and levied on a portion of the rolling stock of the road, and caused the same to be advertised for sale.

This bill was filed to enjoin the sale, and a decree was rendered perpetually enjoining it in the court below, which is now before us on appeal.

The first two grounds of objection taken to this decree may be considered together. They are: 1, that the mortgage to the trustee of the 1st April, 1852, is void or inoperative, as respects the locomotives and cars which were levied on under the execution of the defendants, inasmuch as they were not in existence at the date of it, but were constructed and placed on the road afterwards, being subsequently-acquired property of the company. And, 2, that the mortgage is void, on the ground of uncertainty as to the property described or attempted to be described therein and conveyed to the mortgagee. The description begins by conveying "all the following present and future acquired property of the said parties of the first part;" and after specifying the road and the several parts of it, together with the rolling stock, there is added, "and all other personal property, right thereto, and interest therein." This clause, probably, from the connection in which it is found, was intended to refer to property appurtenant to the road, and employed in its operation, and which had not been enumerated; and if so, the better opinion, perhaps, is, that it would be bound by the mortgage even as against judgment creditors.

But it is unimportant to express any opinion upon the question, as the property in this case (the locomotives and cars) levied on are articles specifically enumerated; and the only uncertainty existing in respect to them arises out of their non-existence at the date of the mortgage. An uncertainty of this character [* 127] need not be separately examined, as it will be * resolved by a consideration of the first question, which is, whether or not the after-acquired rolling stock of the company placed upon the road attaches, in equity, to the mortgage, if within the description, from the time it is placed there, so as to protect it against the judgment creditors of the railroad company?

If we are at liberty to determine this question by the terms and clear intent of the agreement of the parties, it will be found a very plain one. The company have agreed with the bondholders (for

the mortgagee represents them) that if they will advance their money to build the road, and equip it, the road and equipments thus constructed, and as fast as constructed, shall be pledged as a security for the loan. This is the simple contract, when stripped of form and verbiage; and, in order to carry out this intent most effectually, and with as little hazard as possible to the lender, the company specially stipulate that the money thus borrowed shall be faithfully applied in the construction and equipment of the road. And in further fulfillment of the intent, the company agree that, in case of default in the payment of principal or interest, the bondholders may enter upon and take possession of the road, and run it themselves, by their agents, applying the net proceeds to the payment of the debt.

The bondholders have fulfilled their part of the agreement—they have advanced the money on the faith of the security; the company have also fulfilled theirs—they have made the road and equipped it; it has been partially in operation since January, 1852, and in operation upon the whole line since May, 1854. The road, therefore, as described in the mortgage, from Hudson to Millersburg, and which was in the course of construction at the date of the instrument, has been finished, and the rolling stock, locomotives, tenders, and cars, also described in it, and which were to be afterwards acquired, have been brought into existence, and placed upon it—all in conformity with the agreement of the parties; and the question is, whether there is any rule of law or principle of equity that denies effect to such an agreement.

The main argument urged against it is founded upon the * maxim that "a person cannot grant a thing which [* 128] he has not:" *ille non habet, non dat*; and many authorities are referred to at law to prove the proposition, and many more might have been added from cases in equity, for equity no more than law can deny it. The thing itself is an impossibility. It may at once, therefore, be admitted, whenever a party undertakes, by deed or mortgage, to grant property, real or personal, *in presenti*, which does not belong to him or has no existence, the deed or mortgage, as the case may be, is inoperative and void, and this either in a court of law or equity.

But the principle has no application to the case before us. The mortgage here does not undertake to grant, *in presenti*, the property of the company not belonging to them or not in existence at the date of it, but carefully distinguishes between present property and that to be afterwards acquired. Portions of the road had been acquired and finished, and were in operation, when the mort-

gage was given, upon which it is conceded it took effect; other portions were acquired afterwards, and especially the iron and other fixtures, besides the greater part of the rolling stock.

The terms of the grant or conveyance are: "all present and future to be acquired property of the parties of the first part"—that is to say, "their road, made or to be made, and all rails and other materials, &c., including iron rails and equipments, procured or to be procured," &c. We have no occasion, therefore, of calling in question, much less denying, the soundness of the maxim, so strongly urged against the effect of the mortgage upon the property in question, as its force and operation depend upon a different state of facts, and to which different principles are applicable. The inquiry here is, not whether a person can grant *in presenti* property not belonging to him, and not in existence, but whether the law will permit the grant or conveyance to take effect upon the property when it is brought into existence, and belongs to the grantor, in fulfillment of an express agreement, founded on a good and valuable consideration; and this when no rule of law is infringed or rights of a third party prejudiced. The locomotives and cars were all placed upon the road as early as February, 1854, * when, at the furthest, the mortgage attached to those in question, according to its terms, if at all, and the judgment of the defendants was not recovered till May, 1856.

We think it very clear, if the company, after having received the money upon the bonds and given the mortgage security, had undertaken to divert the fund from the purpose to which it was devoted, namely, the construction of the road and its equipment, and upon which the security mainly depended, a court of equity would have interposed, and enforced a specific performance. One of the covenants was, that the money should be faithfully applied to the building and equipment of the road; or if, after the road was put in operation, the company had undertaken to divert the rolling stock from the use of the road, a like interposition might have been invoked, and this in order to protect the security of the bondholders. And if a court of equity would thus have compelled a specific performance of the contract, we may certainly with confidence conclude that it would sanction the voluntary performance of it by the parties themselves, and give effect to the security as soon as the property is brought into existence.

The case of *Langton v. Hasten* (1 Hare's Ch. R. 549) supports this view. The mortgage security in that case was the assignment of the ship *Foxhound*, then on her voyage to the South seas, together with all and singular her masts, &c., "*and all oil and head*

matter, and other cargo, which might be caught or brought home on the said ship, on and from her then present voyage." The cargo was levied on by a judgment creditor on the arrival of the ship at home. A bill was filed to have the mortgage declared a good and valid security for the moneys advanced, and that the complainants be entitled to the benefit of the security, in preference to the judgment creditor.

The vice chancellor, in giving his opinion, observed: "Is it true that a subject to be acquired after the date of a contract cannot, in equity, be claimed by a purchaser for value under that contract?"

And, in answer to the question, he said: "It is impossible to doubt, for some purposes at least, that by contract an *interest in a thing not in existence at the time of the [* 130] contract may, in equity, become the property of the purchaser for value." And, after reviewing the cases in the books, he concludes: "I cannot, without going in opposition to many authorities which have been cited, throw any doubt upon the point that Bixnie, the contracting party, would be bound by the assignment to the plaintiffs."

There are many cases in this country confirming this doctrine, and which have led to the practice extensively of giving this sort of security, especially in railroad and other similar great and important enterprises of the day. (2 Selden R. 179; 3 Green Ch. R. 377; 32 N. H. Rep. 484; 25 Barb. 286; Ib. 284; 18 B. Monroe, 431; Redfield on Railways, 590, and note; 2 Story R. 630; 7 Jurist, 771; Tapfield v. Hillman.)

In the case of Tapfield v. Hillman, Tindall, Ch. J., seems inclined to the opinion that, even at law, a mortgage security of future acquisitions might have effect given to it, if the terms indicated an intent to comprehend them.

The counsel for the appellee referred to the case of Chapman v. Weimer & Steinbacker, (4 Ohio R. 481,) as denying effect to a mortgage upon after-acquired property. But that was a case at law; and even there the court held that the mortgage attached after the property was acquired, from the time the right was asserted by the mortgagee.

In conclusion upon this point, we are satisfied that the mortgage attached to the future acquisitions, as described in it, from the time they came into existence. As to the claim of the judgment creditors, there are several answers to it.

In the first place, the mortgage being a valid and effective security for the bondholders of prior date, they present the superior equity to have the property in question applied to the discharge of

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the bonds. It is true, if the property covered by the mortgage constituted a fund more than sufficient to pay their demands, the court might compel the prior encumbrancer to satisfy the execution, or, on a refusal, the mortgage having become forfeited, compel a foreclosure and satisfaction of the bond debt, so as to [* 131] enable the judgment creditor to reach the * surplus. Or the court might, upon any unreasonable resistance of the claim of the execution creditor, or inequitable interposition for delay, and to hinder and defeat the execution, permit a sale of the rolling stock sufficient to satisfy it. . But no such ground has been presented, or could be sustained upon the facts before us. On the contrary, it cannot be denied but that the whole of the property mortgaged is insufficient to satisfy the bondholders under the first mortgage, much less when those under the second are included. To permit any interference, therefore, on the part of the judgment creditors, with a view to the satisfaction of their debt, consistent with the superior equity of the bondholders, would work only inconvenience and harm to the latter, without any benefit to the former. (3 Hare's Ch. R. 416; 9 Georgia R. 377; Redfield on Railw. 506; 5 Ohio R. 92.)

In the second place, the judgment sought to be enforced by the defendants was recovered upon bonds of the second issue, and secured, in common with all the bonds of that issue, upon this property, by virtue of the second mortgage. These bondholders have a common interest in this security, and are all equally entitled to the benefit of it; and in case of a deficiency of the fund to satisfy the whole of the debt, in equity, a distribution is made among the holders *pro rata*. The payment of the bonds of the second issue is also postponed until satisfaction of the issue comprehended within the first mortgage, as the second was taken with a full knowledge of the first. To permit, therefore, one of the bondholders under the second mortgage to proceed at law in the collection of his debt upon execution would not only disturb the *pro rata* distribution in case of a deficiency, and give him an inequitable preference over his associates, but also have the effect to prejudice the superior equity of the bondholders under the first mortgage, which possesses the prior lien.

As the judgment creditors can have no interest in the management or disposition of the property, except as bondholders, on account of the deficiency of the fund, it is unimportant to inquire whether or not the court was right in refusing a receiver, [* 132] or to direct a sale of the road with a view to a * distribution of the proceeds. For aught that appears, the road

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has been managed, under its present directors, with prudence and fidelity, and to the satisfaction of the bondholders, the parties exclusively interested.

Another objection taken to the validity of the mortgage is, the want of power under the charter to construct the road from Hudson to Millersburg, and consequently to borrow money and pledge the road for this purpose. There is certainly some obscurity in the statutes creating this corporation as to the extent of the line of its road; but we agree with the court below, that, upon a reasonable interpretation of them, the power is to be found in their charter. They were authorized to construct the road from some convenient point on the Cleveland and Pittsburgh road, in Hudson, Summit county, through Cuyahoga Falls, and Akron, to Wooster, or some point on the Ohio and Pennsylvania railroad, between Massillon and Wooster, and to connect with said Ohio and Pennsylvania road, and *any other railroad running in the direction of Columbus*. It was clearly not limited, in its southern terminus, to its connection with the Ohio and Pennsylvania road, for there is added, "and any other railroad running in the direction of Columbus." The extension of the road to the Ohio Central road at Zanesville, or at some other point on this road, comes fairly within the description.

We have not referred particularly to the authority of the company, under the statute laws of Ohio, to borrow money and pledge the road for the security of the payment, as no such question is presented in the brief or was made on the argument. Indeed, the authority seems to be full and explicit.

Decree below affirmed.

CHARLES FLOWERS, Plaintiff in Error, v. FRANCIS FOREMAN.

23 H. 132.

VOUCHER IN A WARRANTY—STATUTE OF LIMITATIONS.

1. A voucher of a warrantor to defend in Louisiana an ejectment for land the title of which he covenanted to warrant, is not bound by the judgment obtained against him in that suit on his covenant when he had not been served with notice, though a curator had been appointed by this court, and defended for him.
2. In an action of *assumpsit* brought to recover the amount paid to release the title of the judgment against the warrantor in the first suit, the statute of limitation of the State of Maryland, where this second action is brought, must govern.
3. The cause of action accrued on the covenant of warranty when the judgment of eviction was rendered, or when the defendant in that suit paid the money to satisfy the successful party in that suit.

THIS is a writ of error to the circuit court for the district of Maryland, and the case is sufficiently stated in the opinion.

Mr. Brent and Mr. Phelps, for the plaintiff in error.

Mr. Brown and Mr. Brune, for defendant.

[* 143] *Mr. Justice WAYNE delivered the opinion of the court.

We shall cite such facts in this record as are necessary to show the relations and obligations of the parties to it, under the laws of the State of Louisiana, and in that of the circuit court of the United States for the district of Maryland, from which it has been brought here by writ of error.

The plaintiffs are the heirs and universal legatees of Charles Mulhollan, to whom Keller & Foreman sold a tract of land, with an obligation of warranty. On the same day that the conveyance was executed to Mulhollan, he conveyed by deed a part of the land to Reuben Carnal, with a like clause of general warranty.

Afterwards, William J. Calvit, Elizabeth G. Calvit, James A. Calvit, and Coleman W. Calvit, filed their petition in the district court for the parish of Rapides, alleging that they were the heirs of their mother, the lawful wife of their father, Anthony Calvit, and that they were entitled to half of the land, as it had been purchased by their father during their mother's coverture with him, which superinduced between them a community of acquests or gains—there having been by them no stipulation to the contrary. And they allege, also, that their father, as their natural tutor, had sold the land, for a part of which they petitioned, while they were minors, in violation of their rights.

They further state, that Charles Mulhollan and Reuben Carnal were in possession of the land, and ask that one half of it might be adjudged to them, as the heirs of their mother.

Being thus brought into court, Mulhollan and Carnal [* 144] filed *their answers. Each deny the allegations of the plaintiffs—Carnal citing Mulhollan into court as his warrantor; and Mulhollan alleges, in his answer, that he had purchased the land from Keller & Foreman, with a general warranty. He asks that they might be cited, to defend him in his title and possession; and that, as they were absentees from the State of Louisiana, he prayed for the appointment of curators *ad hoc*, to represent them in the case.

George K. Waters was designated by the court as their curator; and, upon being summoned, appeared in that relation, and, assuming to be the attorney of Keller & Foreman, filed an answer for

them. Keller & Foreman, however, never had any knowledge of the suit, nor any notice of the appointment of Waters as curator.

Waters, in his answer, cited in warranty the legal representatives of A. J. Davis, deceased, from whom Keller & Foreman had bought the land.

The legal representatives of Davis appeared, by George Purvis, their curator, and in their turn cite in warranty, Anthony Calvit, their ancestor's vendor, who was *the father of the plaintiff*, by whom the land had been sold to Davis. Anthony Calvit appeared by attorney, denying the petitioner's allegations.

After several continuances, the case was brought to trial in the district court, and judgment was entered for the defendants. The plaintiff carried it by appeal to the supreme court of Louisiana. The judgment of the court below was reversed, on the 26th November, 1845. That court decided that the two youngest petitioners, James and Coleman Calvit, were each entitled to one undivided eighth of the land in controversy; but that William J. Calvit and Elizabeth G. Calvit were excluded from recovering, on account of the prescription of ten and twenty years, which Mulhollan had pleaded in his answer. The court then remanded the cause to the district court, for further proceedings on the question of improvements, costs, and profits, and of damages between the warrantors.

Afterwards, on a rehearing, the supreme court directed a further inquiry to be made, for the purpose of ascertaining * whether the price received for the land by the father and [* 145] tutor of the plaintiff had been applied to the payment of the debts of the community of their father and mother; "and it ordered, if any of it had been, that James and Coleman Calvit should contribute in proportion to their rights in the land; and that, in the meantime, no writ of possession should issue until they had paid the amount which the court below might determine to be due by them."

After the rendition of the supreme court's decree, Charles Mulhollan died. His will was admitted to probate on the 11th July, 1846. On the same day his death was suggested, and an order was passed to renew the suit in the names of his legal representatives. Three days afterwards, Thomas O. Moore, the executor of Mulhollan, paid to James and Coleman Calvit \$2,400 for a relinquishment of their claims to the land in controversy, and of all their rights in the judgment which had been rendered in their favor.

No further proceedings were had in the suit from the 11th No-

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vember, 1846, to the 30th May, 1853, when the plaintiffs in this suit made themselves parties, as heirs and universal legatees of their uncle, Charles Mulhollan, the original defendant. They adopted his answers and defenses, and ask for judgment against his warrantors, Keller & Foreman; which was given on the following day, in the district court, to which the cause had been remanded, for those purposes only heretofore stated.

Such have been the relations of the parties named in the record, in the district and supreme court of the State of Louisiana. Whatever was the liability of Keller & Foreman, as warrantors of Mulhollan, they never were subjected to the jurisdiction of the district court, by any valid proceeding from it, to enable that court to carry that liability into a judgment in favor of Mulhollan, their vendee, or in favor of his representatives, Charles and Alice Flowers.

When Mulhollan answered the petition of the Calvits, and asked that Keller & Foreman should be cited into court as his warrantors, no citation for that purpose was served upon them to do so. One

was issued for and served upon Waters, to represent them [* 146] as curator *ad hoc*; but that was insufficient * to give to

the district court jurisdiction to pronounce judgment against them, though that court did do so. Hence it is that this action of *assumpsit* was instituted, to recover damages alleged to have been sustained upon a breach of the warranty of Keller & Foreman to Mulhollan.

In the declaration in this action, it is recited that Keller & Foreman had conveyed to Mulhollan a tract of land, with warranty, and that the supreme court had adjudged that James and Coleman Calvit were each entitled to an undivided eighth of the same. They were declared to have entered into the same, and evicted Mulhollan from it; in consequence of which, Mulhollan, to regain his possession, had paid to James and Coleman Calvit twenty-four hundred dollars, for the relinquishment of their claims to the land. To this action, the defendant pleaded *non assumpsit*; and it was agreed in writing, by the counsel in the cause, that, under such issue, all errors in pleading should be mutually waived, and that the defendant was to be permitted, under it, to rely upon the statute of limitations.

Upon the trial of the case, that point was urged. The statutes of Maryland of the years 1715, ch. 23, and 1818, ch. 216, entitled, Acts to avoid suits at law, were insisted upon, as constituting a bar to the recovery of the plaintiffs. Such was the instruction given by the court.

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There is no error in the instruction. More than three years had elapsed after their right of action had accrued, before the plaintiffs brought their suit. Their uncle had been judicially declared not to be entitled to a part of the land by the decree of the supreme court. That of itself was an eviction under the law of Louisiana, though the court postponed giving a writ of possession to the parties in whose favor its decree was made, for the purpose of having certain points ascertained in which all the parties to the cause were interested—no one of them more so than Mulhollan himself. The date of the supreme court's decree in favor of the two Calvits is 26th November, 1845, shortly after Mulhollan died. The district court had not then adjudged those points for which the case had been remanded to it.

* Before that was done by the court, and soon after Mul- [* 147] hollan's death, his active executor, Moore, on the 14th November, 1846, bought from the two Calvits their claim to that part of the land which had been decreed to them by the supreme court. This itself was an eviction, though the supreme court, in deciding upon these rights to the land, had withheld from the Calvits a writ of possession. It is not necessary, to constitute an eviction, that the purchaser of land should be actually dispossessed. (11 Rob. 397.) It was also ruled in the same case, that an eviction may take place when the vendee continues to hold the property under a different title from that transferred to him by his vendor. In this instance, Mulhollan's representatives held the title to a part of the land, originally bought by him from Davis as a whole, by the purchase of James and Coleman Calvit's undivided eighth.

The same conclusions had been previously ruled by the same court in *Auguste Landry v. Honore Felix Gamel*, 1 Robinson, 362. The court's language is: "It is true that, by the authorities to which we have been referred, the doctrine is well established, that, in order to constitute an eviction, it is not absolutely necessary that the purchaser should be actually dispossessed. That eviction takes place, although the purchaser continues to hold the property, if it be under a title which is not transferred to him by his vendor, as if he should extend the property, or should acquire it by purchase from the true owner." (Pothier, *Vente*, No. 96; Troplong, *Vente*, No. 415; Toullier, vol. 16; Continuation by Duvergier, vol. 1, Nos. 309, 313.) Other cases in the Louisiana reports have the same conclusions, but we do not think it necessary to cite them. The rulings in 1 and 11 Robinson announce it to be the uncontested doctrine in the Louisiana courts, that actual dispossession is not necessary to constitute an eviction, and that, if the purchaser

holds under another title than that of his vendee, an eviction may take place. Those decisions cover the case in hand in both particulars, and they show that the purchaser of the land had suffered an eviction by the decree of the supreme court, in the meaning of that term in the law of Louisiana, though a writ of possession had not been issued. [* 148] * But if that was doubtful, it is certain that the eviction was accomplished when the executor of Mulhollan bought, for the benefit of his testator's estate, the claim to the land which James and Coleman Calvit had acquired.

Mulhollan, by his will, granted to his executors, immediately on his death, full and entire seizin and possession of all his estate, to hold and manage the same until all the legacies given by him were paid over and fully discharged. The signification of a delivery of seizin to an executor will be found in articles 1652, 1664, 1666, 1667, of the Civil Code, and in 35 of Revised Statutes, 3. These articles provide that a testator may give the seizin of the whole or of a part of his estate to his executor, accordingly as he may express himself. The seizin usually continues for a year and a day, but may be prolonged by an act of the court, and may be terminated whenever the heirs shall deliver to the executor a sum sufficient to pay the movable legacies. The seizin of the executor is distinct from and paramount to the seizin which the law vested in the heir immediately on the death of his ancestor, and the heir can only deprive the executor of it by providing security for the performance of his obligations. The executor represented the reception, in so far as respects creditors and legatee. (*Bird v. Jones*, 5 Ann. La. Rep. 645.) When the testamentary executor submitted to the title of the Calvits, and paid them for it, that was an eviction, which gave to him a right of action in behalf of the succession against the warrantors of his testator. His right of action passed to the heirs of Mulhollan when he delivered the succession to them, or whenever it came to their hands by due course of law. It was delivered to them, and the executor's seizin terminated in the year 1847, though the precise day does not appear in the record. The heirs, upon its termination, were reinstated in all the rights which had been temporarily administered by the executor. Those rights will be found in articles 934, 935, 936, of the Code. One of the effects of those rights is to authorize the heir to institute all the actions which the testator could have done, to prosecute to a conclusion such as had been commenced by the testamentary executor, and to commence [* 149] all *actions which he had failed to institute belonging to the succession. (15 Lou. 527; 7 Rob. 183; 2 Ann.

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339 ; 7 Ann. 367.) In such a suit by the heirs, the same defenses may be made which could have been applied if the executor's seizin had been continued. But in this instance, neither the executor nor the heirs, the plaintiffs in the suit, took any legal step to carry to a judgment Mulhollan's citation of Keller & Foreman in warranty in the district court of the parish of Rapides, until the 30th May, 1853, more than fourteen years after the eviction of Mulhollan had occurred, and after the rights of the Calvits had been bought. The heirs now, however, seek by this suit in *assumpsit* in the circuit court of the United States for the district of Maryland, to recover damages from Foreman, the survivor of his partner, Keller, for the failure of their warranty to Mulhollan, the suit having been commenced between eight and nine years after their right of action had accrued. The defendant relies upon the statutes of limitation of Maryland as his defense to prevent a recovery. We think it must prevail, and that the court below, in giving to the jury such an instruction, committed no error. We therefore direct its judgment to be affirmed.

SIMEON BENJAMIN, Plaintiff in Error, v. OLIVER B. HILLARD and
MOSES C. MORDECAI.

23 H. 149.

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CONSTRUCTION OF CONTRACT—GUARANTOR.

1. The following contract of guaranty was indorsed on the back of an agreement by Hopkins & Leach to build and put in operation a steam engine for running the machinery of a saw and grist mill: "For value received, I hereby guaranty the performance of the within contract on the part of Hopkins & Leach; and in case of non-performance thereof, to refund to Messrs. Hillard & Mordecai all sums of money they may pay or advance thereon, with interest from the time the same is paid." Held, that this is not an alternative contract, but is an obligation that the contractors shall perform the contract by building such machines as it calls for, and if there is a non-performance, whether excusable or not, to repay the money advanced by the other party.
2. The consent of plaintiffs to a prolongation of the time of performance did not relieve the guarantor from his liability for the character of the work. Nor did the receipt and payment of the full price by plaintiffs have that effect.
3. The rule of damages is not the contract price of the defective machinery, but what it would cost plaintiff to make it equal to what it should have been.

WRIT of error to the circuit court for the southern district of New York. The case is stated in the opinion.

Mr. Tracy and *Mr. Noyes*, for plaintiff in error.

Mr. Goddard, for defendant.

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[* 162] *Mr. Justice CAMPBELL delivered the opinion of the court.

In September, 1847, Hillard & Mordecai employed the firm of Hopkins & Leach to make at Elmira, in New York, and deliver to them at Wilkesbarre, Pennsylvania, a steam engine, and apparatus necessary to put the same in complete operation, of the best materials and in the most substantial and workmanlike manner, according to specifications, and warranted to be of sufficient capacity and strength to drive six run of stones, and the gearing and machinery necessary for flouring and gristing purposes. Also, to make and deliver the cast-iron, wrought-iron, steel, and composition work for driving six run of stones, and the machinery attached, of the best materials and workmanship. These they were to erect and put up on a foundation prepared by Hillard & Mordecai, who were to afford the proper aid for that purpose. The machinery was to be completed and delivered at Wilkesbarre upon the first safe and navigable rise in the water of the river (Chemung) in the ensuing spring; and Hopkins & Leach were to give a responsible individual for security for the money paid on the contract; and for its fulfillment, Hillard & Mordecai agreed to pay two thousand dollars the first of December, 1847; two thousand dollars the first of February, 1848; and the remainder upon the completion of the work, for which payments they were to be allowed interest. Before the first payment, the defendant subscribed an agreement, indorsed on the contract, as follows: "For value received, I hereby guaranty the performance of the within contract on the part of

Hopkins & Leach; and in case of non-performance thereof,

[* 163] *to refund to Messrs. Hillard & Mordecai all sums of money they may pay or advance thereon, with interest from the time the same is paid." This suit was brought on this guaranty by Hillard & Mordecai for the insufficiency of the work done by Hopkins & Leach. On the trial, they adduced testimony to show that the engine and apparatus set up by Hopkins & Leach were not of the best material, nor of substantial and workmanlike construction, and had not strength to drive six run of stones, and in improving them they had sustained expense and loss; that from the middle of December, 1847, till December, 1858, the time when the work was finished, they had advanced fifty-five hundred dollars, and that only a trifling balance existed at that date, which was paid before the work had been tested by use; that afterwards, and in that month, defects were discovered, of which Hopkins & Leach had notice. In consequence of which, they made efforts to improve their work; but in June, 1849, the plaintiffs procured an examination to be made by three machinists and engineers, whose

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report upon the imperfection of the machinery was communicated to Hopkins & Leach and to the defendant, and who were required to amend their work. This notice and report were read to the jury, the defendant excepting to their competency. The defendant, after the case of the plaintiff was submitted to the jury, insisted to the court that his contract was merely a guaranty, either of the performance of the agreement by Hopkins & Leach by the delivery of the machinery, or the refunding of the moneys that might be paid before that event; and that the advances of the plaintiffs, being in drafts or notes, and not within the time limited by the contract, the defendant was not liable at all, or if liable, only to the extent of the payment of \$4,000, until they had fully performed their contract; and the plaintiffs having fully paid off Hopkins & Leach, and receipts being given, the defendant had a right to consider his guaranty as at an end.

The court overruled a motion to nonsuit the plaintiff, and instructed the jury that the defendant was responsible on his contract, not only for the non-payment of the money advanced to Hopkins & Leach in case they failed to make and deliver *the engine and machinery, but also for the full and [*164] faithful performance of all the agreement of Hopkins & Leach. The general rule is, to attribute to the obligation of a surety the same extent as that of the principal. Unless from the terms of the contract an intention appears to reduce his liability within more narrow bounds, a restriction will not be imposed by construction contrary to the nature of the engagement. If the terms of his engagement are general and unrestricted, and embrace the entire subject, (*omnem causam*,) his liability will be measured by that of the principal, and embrace the same accessories and consequences, (*connexorum et dependentium*.) It will be presumed that he had in view the guaranty of the obligations his principal had assumed. Poth. on Ob. 404; 3 M. and S. 502; *Boyd v. Moyle*, 2 C. B. 644.

In the case before us, the contract of the surety is not in the alternative, but consists of two terms: one, that the principals shall perform their engagement, not merely by the delivery of some machinery, but of such machinery as the contract includes; the other, that if there be a non-performance, whether excusable or not, the money advanced on the contract shall be secured to the plaintiffs to the extent for which their principals are liable.

The defendant, to sustain his defense that the plaintiffs had varied their agreement with Hopkins & Leach, adduced testimony to the effect that the latter had informed them of their inability to

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complete the work "by the first safe and navigable rise in the river," and that they assented to the delay proposed by them till another rise; that a portion of the work was sent in April, and a portion in June, and a portion in October, and that the plaintiffs were not ready to receive it until October, and it was not erected until December, 1848, at which time a settlement took place, and the plaintiffs paid the small balance then due.

The circuit court instructed the jury that the waiver by the plaintiffs of the punctual delivery of the engine and machinery did not constitute such a change in the contract as to discharge the guarantor.

That a mutual alteration of the contract by the principal parties would operate to discharge the *defendant as a guarantor; but an acquiescence on the part of the plaintiffs in a longer time than was specified in the contract for fulfillment, especially as the time of fulfillment was somewhat indefinite, would not, as matter of law, operate to discharge the defendant; and the court declined to charge the jury "that if they believed that the performance of the contract was essentially altered or varied, or the time of the delivery of the machinery at Wilkesbarre extended upon good consideration, without the knowledge or consent of the defendant, the plaintiffs were not entitled to recover."

The agreement of Hopkins & Leach comprised the manufacture of complicated machinery of distinct parts and different degrees of importance, and these were to be transported to a distance, there to be set up in connection with other works about which other persons were employed. That such a contract should not be fulfilled to the letter by either party is not a matter of surprise. The covenants are independent; and there is nothing that indicates that a failure on either part to perform one of these covenants would authorize its dissolution, or that the breach could not be compensated in damages.

The evidence does not allow us to conclude that there was any intention to change the object or the means essential to attain the object of the original agreement. In its execution, there were departures from its stipulations; but these seem to have been made on grounds of mutual convenience, and did not increase the risk to the surety. He was fully indemnified by his principals until after the settlement between the plaintiffs and Hopkins & Leach.

It is clear that the mere prolongation of the term of payment of the principal debtor, or of the time for the performance of his duty, will not discharge a surety or guarantor. There must be another contract substituted for the original contract, or some alteration in a point so material as in effect to make a new contract, without the

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surety's consent to produce that result. But when the essential features of the contract and its objects are preserved, and the parties, without objection from the surety, and without any legal constraint on themselves, mutually accommodate each other, so as better to *arrive at their end, we can find no [* 166] ground for the surety to complain. The circuit court presented the question fairly to the jury, and the exceptions to the charge cannot be supported. Trop. de Caution, 575; Beaubien v. Stoney, Spear So. Ca. Ch. R. 508; 11 Wend. 312.

The defendant adduced testimony to show that the plaintiffs accepted the engine and machinery; that an account was stated between the plaintiffs and Hopkins & Leach of the work done and money paid, and an acknowledgment of its settlement entered upon it, and signed by the parties; that Hopkins & Leach exhibited this account to the defendant, and demanded a return of the securities they had deposited with him for his indemnity, and that they were yielded on the credit given to that acknowledgment. He requested the court to instruct the jury, that if they believed that the defendant relying upon the receipt given by the plaintiffs, settled with Hopkins & Leach, and surrendered to them securities he held to indemnify him against the liability he assumed by his guaranty, and such surrender and discharge were made after the settlement between Hopkins & Leach and the plaintiffs, and upon the faith of it, the plaintiffs are bound by such settlement and receipt, so far as the same relates to the defendant, they having put it in the power of Hopkins & Leach to procure the surrender of such securities for the defendant. This prayer finds its answer in the agreement of Hopkins & Leach, and the guaranty of the defendant.

The material of which the machinery was to be composed, and the workmanship and capacity of the manufacture, were warranted. The defects in the machinery were latent, and could only be ascertained by its use. The settlement between the parties did not embrace the subject to which the warranty applied, nor contain any release or extinguishment of the covenants concerning it. The cause of the present suit is not the same as that included in the stated account, or acknowledgment entered upon it.

The present suit originates in the contract between Hopkins & Leach and the plaintiffs. The former could not plead that settlement in bar of a similar suit against them; and, consequently, *their guarantor cannot. They have miscon- [* 167] ceived the import of that settlement without the agency of the plaintiffs, and are not entitled to charge them with the consequent loss.

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The circuit court instructed the jury, that if they found the engine, boilers, and apparatus for steam power, were sufficient to drive six run of stones suitable for grinding, the damages to be found should be such as would enable the plaintiffs to supply the deficiency, and that they were not required to assume the contract price as the full value of such machinery.

The principle thus laid down coincides with that in *Alder v. Keightly*, 15 M. and W. 117. "No doubt," say the court in that case, "all questions of damages are, strictly speaking, for the jury; and, however clear and plain may be the rule of law on which the damages are to be found; the act of finding them is for them. But there are certain established rules, according to which they ought to find; and here is a clear rule: that the amount that would have been received, if the contract had been kept, is the measure of damages if the contract is broken." This rule was reaffirmed in *Hadley v. Baxendale*; 10 Exch. 341. The exception to the introduction of the notice to the defendant, and the report accompanying it, cannot be sustained. It was proper for the plaintiffs to notify the principals and their surety of the defects in their work, and to call upon them to amend it. The report was not introduced as testimony of the defects, nor can we assume that it was used for that purpose. Upon the whole record our conclusion is, there is no error, and the judgment of the circuit court is affirmed.

DAVID OGDEN, Appellant, v. JOTHAM PARSONS, and others.

23 H. 167.

EVIDENCE—FULL CARGO.

What is a full cargo for a vessel is matter to be determined by the evidence of experts; and as three competent witnesses testify that the vessel in this case was loaded as deep as prudence permitted, no damages can be recovered for refusal to take more.

APPEAL from the circuit court for the southern district of New York. The case is stated in the opinion.

Mr. Owen and *Mr. Vose*, for appellant.

Mr. Parsons and *Mr. Donohue*, for appellees.

[* 168] * Mr. Justice GRIER delivered the opinion of the court.

The libelants let the ship *Hemisphere* by charter-party to David Ogden on a voyage from Liverpool to New York. The covenants which are the subject of this litigation are briefly as fol-

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lows: "Ogden, to furnish a *full cargo* of general merchandise, and not exceeding 513 passengers, to pay £1,500 for the use of the ship, to have fifteen running lay days, and for every day's detention beyond that to pay one hundred dollars."

The libel demands \$700 as demurrage for seven days, and for a balance yet due on the contract.

The answer denies any liability for demurrage, admits that * the whole amount of £1,500 has not been paid, and [* 169] charges libelants with breaches of their charter-party, and damages in consequence thereof exceeding the balance claimed by them.

1st. "Because that they carelessly, wrongfully, and contrary to usage, stowed portions of the cargo where it ought not to have been stowed," and thereby deprived respondent "of the full and lawful use of the ship," by having room for only 350 passengers instead of 513.

2d. That libelants would not take and receive a "*full cargo* of general merchandise."

The district court decided against the charge for demurrage, but allowed the respondent no damages for the alleged breaches of the charter-party by libelants.

On appeal by respondent to the circuit court, the sum of \$1,200 was allowed him by that court for the breach first mentioned with regard to the number of passengers received.

From this decree the respondent has appealed to this court.

As the libelants have not appealed from the decree of either the district or circuit court, the only question now to be considered is, whether the respondent has shown himself entitled to more damages than were allowed him by the circuit court.

The judge of the circuit court being of opinion, from the evidence, that the cargo might and ought to have been stowed so as to admit the full number of passengers, (513,) made a calculation from admitted data of the damage to respondent on that account, without referring the case again to a master, and deducted the sum of \$1,200 from the amount of the decree of the district court. Of this the appellant does not complain, but insists that the owners had refused to receive "a full cargo of merchandise."

The registered tonnage of the ship was 1,030 tons; the cargo of general merchandise received was 1,297 tons.

The charter-party covenants for no specific amount to be received. What was a "full cargo" under all the circumstances, and whether the ship could have been loaded to a greater depth than 18 feet 10 inches with safety to the lives of the passengers, was a question

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which could be solved only by experienced shipmasters. [* 170] Where experts are introduced to testify *as to opinions on matters peculiar to their art or trade, there is usually some conflict in their testimony. What was a full cargo for this ship to carry with safety was not a fact which could be settled by any rule of law or mathematical computation, and the court must necessarily rely upon the opinions of those who have experience, skill, and judgment, in such matters. At least three competent witnesses of this character testify that the ship was loaded as deep as prudence would permit, under all the circumstances. Both the district and circuit court were of the same opinion, and we do not find in the evidence anything to convince us that they have erred.

Let the decree of the circuit court be affirmed with costs.

SAMUEL IRVINE and others, Plaintiffs in Error, v. HERMAN J. REDFIELD, Collector of Customs.

23 H. 170.

CUSTOMS DUTIES.

This court adheres to the decision in *Sampson v. Peaslee*, 20 How. 571; 2 Miller, 605; that the duties on foreign merchandise, under the act of March 3, 1851, is to be computed on their value on the day of sailing from the foreign port whence they are imported, and that the value for such purpose is the wholesale market price there on that day.

THE case came to this court on a certificate of division of opinion between the judges of the circuit court for the southern district of New York, and the point certified is stated in the opinion of this court. It was submitted without argument.

Mr. Justice WAYNE delivered the opinion of the court.

This case comes to this court under a certificate of division of opinion from the circuit court of the United States for the southern district of the State of New York.

[* 171] *The point made is, "*whether, by the period of exportation of merchandise from a foreign country to the United States, as used in the act of congress entitled, 'An act to amend the acts regulating the appraisement of imported merchandise, and for other purposes,' approved the 3d March, 1851, was to be taken to mean the time when the merchandise had been laden aboard a general ship, and the bill of lading therefor given in a foreign port, or at the time when said ship actually departed from said foreign port, destined to the United States.*"

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The facts in the record are, that the ship Henry Buck was a general ship at the port of Glasgow, in Scotland, in the month of May, 1855, destined for the port of New York, in the United States. That the plaintiff, on the 9th May, 1855, bought three hundred tons of Coltness pig iron, at the then wholesale market price of sixty-four shillings sterling per ton, and immediately commenced to load the same aboard the ship, and that the iron was all laden and bills of lading given for it on the 22d May, 1855, on which day the market price of such iron had risen to sixty-nine shillings per ton; that the ship remained in port, and sailed from Glasgow on the fourth of June, 1855, on which day the market price of such iron had risen to seventy-four shillings and sixpence sterling per ton; And that on the arrival of the ship in the United States, the iron was appraised at the custom-house at the market price of twenty-four shillings and sixpence sterling per ton. On that valuation the defendant collected duty, and twenty per cent. on such value, in conformity with the 8th section of the act of congress entitled, "An act reducing the duty on imports, and for other purposes," approved the 30th July, 1846.

This court considered two years since in the case of *Sampson v. Peaslee*, 20 Howard, 571, the meaning the acts of congress of the 30th July, 1846, and that of the 3d March, 1851, for the collection of duties upon imported goods, and when and upon what twenty per centum should be charged upon an under-valuation made by an importer in his entry of merchandise. It announced then, that if the appraised value of imports which have actually been purchased shall exceed by ten per centum or more the value of them declared upon the *entry, then, in addition to [* 172] the duties imposed by law upon the value of the same, there shall be levied, collected, and paid, a duty of twenty per centum *ad valorem* on such appraised value. That the additional value of twenty per centum could only be levied upon the appraised value, and not upon charges and commissions added to it. Also, that the day of the sailing of a vessel from a foreign port is the true period of the exportation of the goods; and that the secretary of the treasury had given a proper interpretation of the statute, in directing it to be done on the market value of the goods imported on the day of the sailing of the vessel, and that he was authorized by law to give such a direction.

We see no cause now for a different interpretation of the statute, and direct that the question certified to this court be answered, "that the duties upon foreign merchandise are to be computed on their value on the day of the sailing of the vessel from the foreign

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port, and that the value for the computation is the wholesale market price there on such day."

EDWARD H. CASTLE and others, Plaintiffs in Error, v. EDWARD F. BULLARD.

23 H. 172.

PRACTICE IN CIRCUIT COURT—NONSUIT—EVIDENCE.

1. It is the settled doctrine of this court that the circuit court cannot order a nonsuit against the wish of the plaintiff.
2. Nor will the court, at the close of the evidence on both sides, direct a verdict of acquittal, or permit a jury to pass on the guilt of one defendant among several, where there is any testimony against him which should go to the jury, though the other defendants may wish to use him as a witness.
3. Where the foundation of the suit is a fraud, evidence is admissible of other similar frauds practiced by defendants on other persons about the same time, both before and after the one in controversy.
4. The fraud charged consisted in selling plaintiff's goods as commission merchants to an insolvent person, knowing him to be such, and in recommending said purchaser to plaintiff as solvent in regard to goods sold him by plaintiff. Held, that evidence of the insolvent character of said purchaser, and his acts and conduct in regard to such goods, and that defendants had made representations of a similar kind to other persons, are admissible, and that in a question of fraud to be proved by circumstantial evidence a wide range of inquiry is allowable.
5. The partnership being in possession of the goods as commission merchants, fraudulent representations by one or more of the firm to induce plaintiff to sell the goods to an insolvent purchaser, render the firm liable for the fraud.

THIS is a writ of error to the circuit court for the northern district of Illinois, and the matter is fully stated in the opinion.

Mr. Dickey, for plaintiffs in error.

Mr. Gillet, for defendants.

[* 180] * Mr. Justice CLIFFORD delivered the opinion of the court.

This was a writ of error to the circuit court of the United States for the northern district of Illinois.

Edward F. Bullard, a citizen of the State of New York, complained in the court below of Joseph Filkins, J. P. Phillips, Elihu Granger, and Edward H. Castle, in a plea of trespass on the case, alleging, at the same time, that they were partners, doing business as commission merchants at Chicago, in the State of Illinois, under the style and firm of Filkins, Phillips, & Company.

According to the transcript, the declaration was filed on the seventh day of July, 1856. As amended, it contained five counts,

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setting forth, in various forms, two distinct grounds of complaint against the defendants, which may be briefly stated as follows:

In the first place, it is alleged that the defendants, on the eighth day of November, 1855, fraudulently sold on credit, at Chicago, to one Edward S. Castle, certain goods belonging to the plaintiff, and which he had previously intrusted to them, as commission merchants, for sale; and that the purchaser, at the time of the sale, was in failing circumstances and irresponsible; charging, in the same connection, that the defendants, at the time of the transaction, well knew that the purchaser was insolvent, and wholly unfit to be trusted; and that they negotiated the sale with intent to deceive and defraud the plaintiff, whereby he suffered loss to an amount equal to the value of the goods so sold and delivered.

He also alleged, in other counts, that the defendants, prior to the sale of the goods, and at the time when it was made, represented to him that the said Edward H. Castle was worth at least eight thousand dollars above all his liabilities; that he was not embarrassed in his business affairs, or much indebted, and that he was a safe, cautious business man, and every way worthy of credit. Those representations, the plaintiff alleged, were false, and that the defendants well knew they were so at the time of the negotiation, and when the goods were delivered; and that they were so made by the defendants with intent to deceive and defraud him in the premises, and *had the effect to induce him to consent [* 181] to the sale, and to deliver the goods, whereby he suffered loss, as is alleged in the other counts.

To those charges, as more formally set forth in the several counts of the declaration, the defendants jointly pleaded that they were not guilty; and on the third day of January, 1857, the parties went to trial on that issue.

Testimony was introduced by the plaintiff in the opening, showing that Filkins, Phillips, & Company, were commission merchants at the time of this transaction, doing business at Chicago, in the State of Illinois, and that they received the goods in question a short time prior to the sale, from one William H. Adams, of that city, to whom the goods had previously been sent by the plaintiff to be sold on commission. He also proved the sale of the goods by one of the firm of Filkins, Phillips, & Company, to Edward H. Castle, on credit, substantially as alleged in the declaration, and that two of the partners and the clerk of the firm were present at the time the sale took place.

Facts and circumstances were also adduced by the plaintiff, tending strongly to show that the purchaser was largely indebted and

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in failing circumstances at the time of the negotiation, and that two or more of the members of the firm must have known that he was insolvent and utterly unworthy of credit.

Five per cent. was charged as commissions on the sale of the goods, amounting to the sum of one hundred and thirty-five dollars; and the plaintiff introduced testimony tending to show that the purchaser, as a part of the transaction, gave his promissory note to the firm, payable in forty-five days, to secure that amount.

Evidence was also introduced by the plaintiff, showing that representations as to the business circumstances and pecuniary responsibility of the purchaser were made to him at the time of the sale, by one or more of the defendants, substantially in the manner as alleged in the declaration. And it was clearly shown that two or more of the firm well knew that those representations were false, and that the subject of them was wholly unfit to be trusted for that amount.

[* 182] *Proof was also introduced by the plaintiff, showing that the purchaser was a relative of one of the firm, and that he had repeatedly been assisted by others in obtaining credit. And many of the circumstances were of a character to afford a ground of presumption that all of the defendants must have known the true state of his affairs, and that he was insolvent.

When the plaintiff rested his case, in the opening, the counsel of the defendants moved the court to order a nonsuit as to the defendant, Granger, upon the ground that the evidence offered by the plaintiff did not tend to charge him with a participation in the fraud alleged in the declaration. At that stage of the cause, there was no evidence immediately connecting him with the transaction, except what might properly arise from the fact of his being one of the partners. But the court overruled the motion for a nonsuit, and the defendants excepted.

They then requested the court, that the jury might be permitted to retire, and consider whether the evidence introduced was sufficient to charge this defendant; and if not, that the jury might be directed to find him not guilty; urging, as a reason for the motion, and they desired to examine him as a witness for the other defendants; but the court overruled the application, and the defendants excepted.

After these motions were overruled, evidence was introduced by the defendants and further evidence was given by the plaintiff; all of which was submitted to the jury, who returned their verdict in favor of the plaintiff.

Numerous exceptions were taken by the defendants in the pro-

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gress of this trial to the rulings of the court, in admitting and rejecting evidence, and they also excepted to two of the instructions given by the court to the jury.

1. As the facts have been found by the jury, the questions to be determined are those that arise upon the exceptions. Of these, the first in the order of the argument at the bar is the one founded upon the refusal of the court to order a nonsuit as to the defendant, Granger, as requested by the counsel at the close of the plaintiff's testimony.

Several answers may be given to this complaint, each of * which is sufficient to show that the exception cannot be [* 183] sustained. In the first place, circuit courts have no power to grant a peremptory nonsuit against the will of the plaintiff. It was expressly so held by this court in *Elmore v. Grymes and al.* 1 Pet. 471, and the same rule was also affirmed in *De Wolf v. Rabaud and al.* 1 Pet. 497. In the case last named, the defendants at the trial, after the evidence for the plaintiff was closed, moved the court for a nonsuit; which was denied, and the defendant excepted, and sued out a writ of error; but this court held that the refusal to grant the motion constituted no ground for the reversal of the judgment, remarking, at the same time, that a nonsuit cannot be ordered in any case without the consent and acquiescence of the plaintiff.

Repeated decisions have been made to the same effect; and as long ago as 1832 it was declared, as the opinion of this court, in *Crane v. The Lessees of Morris*, 6 Pet. 609, that this point was no longer open for controversy. See also *Silsby v. Foote and al.* 14 How. 222.

Another answer to this complaint arises from the fact that the motion for nonsuit is inappropriate in a case like the present, where there are other defendants to whom it cannot be applied. In actions of this description, where there is more than one defendant, the charge, beyond question, as a general rule, is joint and several, and, consequently, one may be found guilty and another not guilty; but at common law there cannot regularly be a nonsuit as to one and a verdict as to others; and for that reason, whenever it appears that there is evidence in the case to charge one or more of the defendants, a nonsuit is never granted at common law, even in jurisdictions where the authority to grant the motion in a proper case is acknowledged to exist. *Revett v. Brown*, 2 M. and P. 18; *Collier on Part.* (Am. ed. 1848,) sec. 809, p. 698.

But a more decisive answer to this ground of complaint arises from the fact that there was evidence in the case tending to charge

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this defendant which rendered it proper that the question of his guilt or innocence should be submitted to the jury. He was a member of the firm of Filkins, Phillips, & Company, as appears by the bill of exceptions. All of the goods in question were deposited in their warehouse, and the jury have found that the goods were sold by the firm. Two of the partners and the clerk of the firm were present at the sale, and the commissions earned in transacting the business went to the benefit of all the partners of which the firm was composed.

In view of all the circumstances as disclosed in the evidence, it would be impossible to say, as matter of law, that it was error in the court to overrule the motion, even if the authority to grant it were conceded.

2. We come now to examine the second exception, which arises out of the refusal of the court to permit the jury to retire at the close of the plaintiff's case, and consider whether the evidence offered in the opening was sufficient to charge this defendant with a participation in the alleged fraud.

Upon this subject the general rule is, that if a defendant who is a material witness for the other defendants has been improperly joined in the suit, for the purpose of excluding his testimony, the jury will be directed to find a separate verdict in his favor; in which case, the cause being at an end with respect to him, he may be admitted as a witness for the other defendants. This course, however, can be allowed only where there is no evidence whatever against him, for the reason that then only does it appear that he was improperly joined in the suit, through the artifice and fraud of the plaintiff. If there be any evidence against him, then he is not entitled to a separate verdict, because, under such circumstances, it does not appear that he was improperly joined, and his guilt or innocence must wait the general verdict of the jury, who are the sole judges of the fact. 1 Greenl. Ev. sec. 358; *Brown v. Howard*, 14 John. 122.

Courts of justice are not quite agreed as to what stage of the trial the party thus improperly joined in the suit may insist upon a verdict in his favor—whether at the close of the evidence offered by the plaintiff in the opening, or whether he must wait until the case is closed for the defendants. Mr. Greenleaf regards it as the settled practice, that if, at the close of the plaintiff's case, [* 185] there is one defendant against whom no evidence is given, he is entitled instantly to be acquitted; and it must be admitted that the decision of the court in *Childs v. Chamberlain*, 6 C. and P. 213, favors that view of the law. But Lord

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Denman held, in *Sowell v. Champion*, 6 Ad. and Ellis, 415, that the application to a judge in the course of a cause, to direct a verdict for one or more defendants in trespass, is addressed to his discretion, and that the discretion was to be regulated, not merely by the fact that, at the close of the plaintiff's case no evidence appears to affect them, but by the probabilities whether any such will arise before the whole evidence in the cause closes. There is, says the learned judge, so palpable a failure of justice, where the evidence for the defense discloses a case against a defendant already prematurely acquitted, that such acquittal ought never to take place until there is the strongest reason to believe that such a consequence cannot follow.

Some courts hold that the application, in all cases, is addressed to the discretion of the court. *Brotherton v. Livingston*, 3 Watts, 334; 1 Holt, 275. Other courts have held, that where there is no evidence to affect a particular defendant in actions *ex delicto* against several, a separate verdict is demandable as a matter of right, and that a refusal to grant the application is the proper subject of exceptions. *Van Dusen v. Van Slyck*, 15 Johns. 223; *Bates v. Conklin*, 10 Wen. 389.

Whatever diversities of decision there may be upon this point, all agree that the application ought not to be granted, unless it appear that there is no evidence to affect the party in whose favor it is made. *Brown v. Howard*, 14 John. 122. Now, it has already appeared that there was evidence in this case affecting this defendant; and, upon that ground, we hold that the circuit court was fully warranted in refusing to grant the application.

3. After a careful consideration of the several exceptions to the rulings of the court in admitting and rejecting evidence, we are of the opinion that none of them can be sustained. Considering the great number of the exceptions, their separate examination at this time will not be attempted, as it would *ex- [* 186] tend this investigation beyond reasonable limits. One class of them arises out of objections to the admissibility of evidence offered by the plaintiff, tending to show that the defendants, or some of them, had aided the purchaser in this case in committing similar acts of fraud in the purchase of other goods, about the same time, from other persons. According to the evidence, some of those purchases were prior and others subsequent to the period of the sale of the goods in this case. All of this class of exceptions may well be considered together, as they involve the same general principles in the law of evidence. Decided cases have established the doctrine that cases of fraud like the present are among the well-

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recognized exceptions to the general rule, that other wrongful acts of the defendant are not admissible in evidence on the trial of the particular charge immediately involved in the issue. Similar fraudulent acts are admissible in cases of this description, if committed at or about the same time, and when the same motive may reasonably be supposed to exist, with a view to establish the intent of the defendant in respect to the matters charged against him in the declaration. Assuming the proposition as stated to be correct, of which there can be no doubt, it necessarily follows, that no one of this class of the exceptions is well taken. Some of the decided cases go farther, and hold that such evidence is admissible, as affording a ground of presumption to prove the main charge; but, whether so or not, it is clearly competent, as tending to show the intent of the actor in respect to the matters immediately involved in the issue on trial. *Cary v. Hoatling*, 1 Hill, 316; *Irving v. Motly*, 7 Bing. 543; *Rowley v. Bigelow*, 12 Pick. 307. Another class of the exceptions arises out of objections made by the defendants to the admissibility of evidence introduced by the plaintiff, which, it is insisted, was irrelevant and immaterial. Some twelve exceptions are embraced in this class, and they are addressed to a large portion of the testimony introduced by the plaintiff.

In the course of the trial, the plaintiff offered evidence tending to show the pecuniary circumstances of the purchaser of these [* 187] goods, his acts and conduct in respect to the goods * after the purchase, and that he was largely in debt and insolvent.

He also introduced evidence tending to show that two or more of the defendants had represented to other persons, about the same time, that the purchaser of the goods in question was in good standing, and that they had likewise assisted him in obtaining credit with other dealers in merchandise.

To all or nearly all of this evidence, as more fully detailed in the transcript, the defendants objected, and those objections constitute the foundation of the several exceptions included in this class. Much of the evidence was of a circumstantial character; and it is not going too far to say, that some of the circumstances adduced, if taken separately, might well have been excluded. Actions of this description, however, where fraud is of the essence of the charge, necessarily give rise to a wide range of investigation, for the reason that the intent of the defendant is, more or less, involved in the issue. Experience shows that positive proof of fraudulent acts is not generally to be expected, and for that reason, among others, the law allows a resort to circumstances, as the means of ascertain-

ing the truth. Great latitude, says Mr. Starkie, is justly allowed by the law to the reception of indirect or circumstantial evidence, the aid of which is constantly required, not merely for the purpose of remedying the want of direct evidence, but of supplying an invaluable protection against imposition. 1 Stark. Ev. p. 58.

Whenever the necessity arises for a resort to circumstantial evidence, either from the nature of the inquiry or the failure of direct proof, objections to testimony on the ground of irrelevancy are not favored, for the reason that the force and effect of circumstantial facts usually and almost necessarily depend upon their connection with each other. Circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof.†Applying these principles to the several exceptions under consideration, and it is clear that no one of them can be sustained.

Other exceptions to the rulings of court were taken [188] during the progress of the trial; but it is so obvious that they are without merit, that we think it unnecessary to give them a separate examination at the present time, and they are accordingly overruled.

At the argument, it was supposed by the counsel of the original defendants that the circuit judge had allowed the plaintiff to introduce parol proof of the contents of a writ of attachment, referred to by one of the witnesses; but, on examination of the transcript, we find that no such evidence was admitted.

4. Exceptions were also taken to certain portions of the charge of the court. On this branch of the case, most reliance was placed upon certain objections to the first instruction given to the jury, which is as follows:

“If the goods were in the custody of the defendants, for sale on commission, and one or more of the partners made false and fraudulent representations as to the party to whom they were to be sold by the defendants, then the partnership would be liable, if, in consequence of such representations, the plaintiff consented to the sale to that party, and the sale was actually made by the firm to the party.”

Some criticisms were also made in the printed argument for the defendants upon the second instruction, which, like the former, was duly excepted to; but, inasmuch as it is not essentially different in principle from the other, and as the questions presented in each depend upon the same general considerations, it will not be reproduced.

Both instructions were framed upon the theory that the defendants were not liable, unless the jury found from the evidence that the goods were actually sold by the firm; which, to say the least of it, was a theory sufficiently favorable to the defendants. Judge Story says, in his valuable work on partnerships, that torts may arise in the course of the business of the partnership, for which all the members of the firm will be liable, although the act may not in fact have been assented to by all the partners. Thus, for example, if one of the partners should commit a fraud in the [* 189] course of the partnership business, all the partners may be liable therefor, although they may not all have concurred in the act. So, if one of a firm of commission merchants should sell goods consigned to the firm, fraudulently, or should sell goods so consigned in violation of instructions, all the partners would be liable. Story on Part. sec. 166; Collier on Part., (Am. Ed. 1848,) secs. 445 and 457; *Nicoll v. Glennie*, 1 Maule and Selw. 568.

In precise accordance with this view of the law, it was said, and well said, by the court, in *Olmsted v. Hoatling*, 1 Hill, 318, that it does not lie with one to claim property through the fraudulent act of another, whether partner or agent, without being affected by that act the same as if it were his own; and we think the same principle must apply in a case like the present, when a firm doing business as commission merchants have received the fruits of the fraud in the commissions earned for transacting the business.

Where one assuming to be an agent had committed a fraud in a sale, it was held, in *Taylor v. Green*, 8 Car. and P. 316, that the mere adoption of the sale and the receipt of the money, by the person for whom the sale was made, rendered him liable for the fraud.

Suffice it to say, without any further reference to authorities, that the theory of the instructions was sufficiently favorable to the defendants.

5. Complaint is also made that the instructions excepted to were not sufficiently comprehensive; that they did not embrace all the elements which constituted the charge, as laid in the declaration. Strong doubts are entertained whether this point is properly raised by the bill of exceptions; but whether so or not, we are satisfied that the exception cannot be sustained.

Instructions given by the court at the trial are entitled to a reasonable interpretation; and if the proposition as stated is correct, they are not as a general rule to be regarded as the subject of error, on account of omissions not pointed out by the excepting.

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party. Seven requests for instructions to the jury were presented by the counsel of the defendants, every one of which was given by the court, without any qualification. * If the [* 190] defendants had supposed that the instructions given were either indefinite or not sufficiently comprehensive, they might well have asked that further and more explicit instructions should be given; and if they had done so, and the prayer had been refused, this objection would be entitled to more weight.

But another answer may be given to this objection, which is entirely conclusive against it. On recurring to the transcript, we find that the court, before the instructions excepted to were given, explained to the jury the nature and character of the charge, describing substantially the two forms in which it was presented in the several counts of the declaration; and in effect instructed them that it must be proved in the one or the other of those forms, in order to entitle the plaintiff to a verdict in his favor. Those explanations immediately preceded the instructions embraced in the exceptions, and, in fact, may be regarded as a part of the same. Beyond question, the instructions excepted to must be considered in connection with those explanations; and when so considered, it is obvious that this objection cannot be sustained.

In view of the whole case, we think the defendants have no just cause of complaint, and that there is no error in the record. The judgment of the circuit court therefore is affirmed, with costs.

JOHN BAPTISTE BEAUBIEN and others, Appellants, v. ANTOINE BEAUBIEN and others.

23 H. 190.

TENANTS IN COMMON—IMPLIED TRUST—LIMITATIONS.

1. Where the common ancestor died in 1793, seized of land in Detroit, and part of his heirs lived in Canada, and the two sons who lived with him at the time of his death continued in possession and occupation until the commencement of this suit in chancery in 1857, and one of the heirs had the land confirmed to him as a French grant by congress, and a patent issued to him; the case is one which depends on the establishment of an implied trust, and a court of equity will follow the courts of law in applying the statute of limitations.
2. It is no sufficient averment in the bill to avoid the statute that plaintiffs did not know until 1840 of acts and intentions of defendants in fraud of their rights. Some more definite statement of the acts of defendants in concealing the fraud and the efforts of plaintiffs to secure their rights is necessary to arrest the statute of limitations.

THIS is an appeal from the circuit court for the district of Michi-

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gan. The case was heard on demurrer to the bill, as to part of the defendants, which raised the question of the statute of limitations, and on the plea of innocent purchasers for value as to other defendants. The supreme court did not consider the latter point.

Mr. Platt Smith, for appellants.

Mr. Carlisle, *Mr. Emmons*, and *Mr. Russell*, for appellees.

[* 205] *Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from a decree of the circuit court of the United States for the district of the State of Michigan.

The bill was filed by the plaintiffs against the defendants, claiming to be tenants in common with them in a tract of land now lying in the city of Detroit, each party deriving title from a common ancestor, who made the settlement as early as the year 1745, under a concession from the French government. The tract contained five arpens in front on Lake Erie, and eighty arpens back. The ancestor, John Baptiste Beaubien, died in 1793, having had the uninterrupted possession of the property from the time of the concession in 1745, leaving a widow and several children. Two of the sons, Antoine and Lambert, resided with their father at the time of his death, and continued in the possession and occupation with their mother till her death, in 1809.

In 1804, Antoine, one of the heirs in possession, applied [* 206] to *the board of commissioners to adjust land claims, under the act of congress of 1804, to confirm his claim to the land; and which was confirmed accordingly, and a patent issued in 1812. Acts of congress, 26th March, 1804; 3d March, 1805; 3d March, 1807.

Lambert, the other brother, continued in the joint occupation of the tract till his death, in 1815, and subsequently, in 1818, Antoine conveyed to the heirs of Lambert a moiety of the premises; and the present occupants and defendants are the descendants of the two brothers, or purchasers from them under this title.

The tract constitutes a portion of the city of Detroit, and is averred in the bill to have been worth, at the time of the filing of it in 1855, from half a million to a million of dollars, exclusive of the improvements.

The case was presented to the court below on demurrer to the bill, and on pleas by some of the defendants, as *bona fide* purchasers for valuable consideration, without notice.

The plaintiffs aver in the bill, in addition to the facts already stated, that they are the descendants of the brothers and sisters of

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Antoine and Lambert, from whom the title of the defendants is derived, and that Antoine and Lambert and their descendants possessed and occupied the tract in subordination to the right and title of their co-tenants, and that they were permitted to possess and occupy the same in confidence, that they so held the premises for the common benefit of all parties interested. They further aver, that they verily believed that the brothers, Antoine and Lambert, and their legal representatives, were acting in good faith in this respect, until about the year 1840 they discovered, after examination and inquiry into the facts and circumstances, that they intended to cheat and defraud them, and those under whom they claim, of their just rights in the premises.

The bill further states that Antoine, in his lifetime, and his son, who is one of the defendants, and the heirs of Lambert, have conveyed to divers individuals rights in the said tract; that, in some instances, they made donations without consideration; in others, conveyances for a pretended consideration *and [* 207] that there now are in possession, as heirs, donees, and purchasers of different portions of the premises, several hundred persons, most of whose names are unknown to the plaintiffs, which persons set up claims and pretended rights and interests therein. And further, that neither Antoine nor Lambert's heirs, down to the year 1834, committed any open or notorious act, inconsistent with the rights of the plaintiffs, or in any way disavowed the trust and relation as co-tenant, or of brothers or co-heirs, nor in any manner asserted any title to the land, to the exclusion of their rights.

The court decreed upon the demurrer to the bill, and also upon the pleas, in favor of the defendants.

The case comes before us on an appeal from this decree. Antoine and Lambert, the two sons of J. B. Beaubien, the common ancestor, and those claiming under them, have been in the exclusive possession of the premises in question since 1793, a period of sixty-two years before the commencement of this suit. The plaintiffs and those under whom they claim, during all this time, as averred in the bill, resided in Canada, and, as appears, most of them in the county of Essex, in the neighborhood of the premises. The four hundred arpens which, in 1793, were worth some six or seven thousand dollars, now embrace a portion of the city of Detroit, and are worth, with the improvements, over a million of dollars; and, for aught that is averred in the bill or appears in the case, no right has been set up by them, or by those under whom they claim, to the title or the possession of the premises, until the filing of the

bill; no claim to the rents and profits, or to an account as tenants in common, or for partition, or to be admitted to the enjoyment of any right as co-heirs.

The case is one, so far as the title of the plaintiffs is concerned, which depends upon the establishment of an implied trust to be raised by the evidence, and hence falls within that class of cases in which courts of equity follow the courts of law, in applying the statute of limitations. (*Kane v. Bloodgood*, 7 John. Ch. R. 91; *Hovenden v. Annesly*, 2 Sch. and Lef. 607.)

There are two acts of limitation in the State of Michigan, either of which bars the claim of the plaintiffs:

- [* 208] * 1. The act of May 15, 1820, which limits the right of action to twenty years after the same has accrued; and
2. The act of November 15, 1829, which limits the right of entry to ten years, if the cause of action has then accrued.

The language is: "No writ of right or other real action, no ejectment or other possessory action, &c., shall hereafter be sued, &c., if the cause of action has now accrued, unless the same be brought within ten years after the passage of this act, any law, usage, or custom, to the contrary notwithstanding."

There is no saving clause in this as to infants, feme coverts, or residence beyond seas.

The pleader has sought to avoid the operation of the limitation, by an averment of concealment and fraud on the part of the defendants, and those under whom they claim. The plaintiffs aver, "that, until within the last few years, your orators and oratrixes, and those under whom they claim, verily believed and supposed that the said brothers, Antoine and Lambert, and their legal representatives, were acting in good faith towards them, but that, about the year 1840, they discovered by information, after examination and inquiry into the facts and circumstances of the case, that the said brothers, Antoine and Lambert, and their legal representatives, intended to cheat and defraud them, and those under whom they claim, of their just rights in the premises."

This averment is too general and indefinite to have the effect to avoid the operation of the statute. The particular acts of fraud or concealment should have been set forth by distinct averments, as well as the time when discovered, so that the court may see whether, by the exercise of ordinary diligence, the discovery might not have been before made. (*Stearns v. Page*, 7 Howard, 819; *Moore v. Greene*, 19 ib. 69.)

Here, no acts of fraud or concealment are stated; and the time when even an intention to defraud, which is all that is averred,

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was discovered, was some fifty years after the exclusive possession of the defendants and those under whom they claim had commenced; and this, although the parties lived in the neighborhood, and almost in sight of the city, which has, in the meantime, grown up on the premises.

We think the statute of limitation applies, and that the decree of the court below should be affirmed.

THE PHILADELPHIA, WILMINGTON, AND BALTIMORE RAILROAD COMPANY, Appellants, v. THE PHILADELPHIA AND HAVRE DE GRACE STEAM TOWBOAT COMPANY.

23h 209
Led 433
38f 204

23 H. 209.

ADMIRALTY JURISDICTION AS TO LOCALITY—TORTS—SUNDAY.

1. While the jurisdiction of the admiralty court in cases of contract depends on the nature of the contract, in torts it depends solely on the locality. Hence, leaving piles concealed in the navigable waters of a river, by which a vessel is injured, is a marine tort.
2. A railroad company having contracted for the driving of these piles, as part of their bridge across the Susquehanna, and their engineer having superintended the work, and the company having abandoned their bridge before built and discharged the contractor, is responsible for the dangerous condition in which the piles were left.
3. It is no defense to the claim for damages arising from this negligence of defendant that the injury occurred while libellant was violating the Sunday law of Maryland by working on the Sabbath.
4. Where there is conflicting evidence as to the amount of the damages, the judges of the court below can best determine that question, and this court will not reverse a decree on a mere doubt raised by conflicting testimony on that subject.

APPEAL from the circuit court for the district of Maryland. The case is sufficiently stated in the opinion of the court.

Mr. Schley and *Mr. Donaldson*, for appellants.

Mr. Dobbin, for appellees.

* Mr. Justice GRIER delivered the opinion of the court. [* 214]

A brief statement of the facts of this case will be sufficient to show the relevancy of the questions to be decided.

The appellants were authorized by a statute of Maryland to construct a railway bridge over the mouth of the Susquehanna river, at Havre de Grace. They entered into an agreement with certain contractors, to prepare the foundations and erect the piers.

In pursuance of their contract, these persons drove * piles [* 215] into the channel of the river, under the direction of the

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engineers employed by the appellants. Before the completion of the contract, the appellants abandoned their purpose of building the bridge, and discharged the contractors. During the progress of the work, the contractors had driven certain piles, called sight-piles, into the channel of the river, which were not removed or cut off level with the bottom, but were cut a few feet under the surface of the water, so that they became a hidden and dangerous nuisance. The steamboat Superior, engaged in towing boats between Philadelphia and Havre de Grace, left a port in Maryland on Sunday morning, and soon after came into forcible collision with one or more of these piles; in consequence whereof she suffered great damage, and for which this libel was filed.

The appellants have, in this court, insisted chiefly on three points of defense to the charges of the libel:

I. It is contended that the "marine torts," over which courts of admiralty have jurisdiction, are trespasses done and committed with force on the sea and navigable waters, such as collision of vessels, assaults, &c., and that the placing and leaving the piles in the bed of the river, and within the body of a county, is a nuisance at common law, and the remedy of the appellees should have been by an action on the case.

The jurisdiction of courts of admiralty, in matters of contract, depends upon the nature and character of the contract; but in torts it depends entirely on locality. If the wrongs be committed on the high seas, or within the ebb and flow of the tide, it has never been disputed that they come within the jurisdiction of that court. Even Lord Coke (4 Inst. 134) declares, "that of contracts, pleas, and *querels*, made upon the sea or any part thereof, which is not within any county, the admiral hath and ought to have jurisdiction."

Since the case of *Waring v. Clark*, (5 How. 464,) the exception of "*infra corpus comitatus*" is no longer allowed to prevail. In such cases, the party may have his remedy either in the common-law courts or in the admiralty. Nor is the definition of the term "*torts*," when used in reference to admiralty jurisdiction, [* 216] confined to wrongs or injuries committed *by direct force.

It includes, also, wrongs suffered in consequence of the negligence or malfeasance of others, where the remedy at common law is by an action on the case. It is a rule of maritime law, from the earliest times, "that if a ship run foul of an anchor left without a buoy, the person who placed it there shall respond in damages." (See *Emerigon*, vol. 1, page 417; *Consulat de la Mer*, chap. 243; and *Cleirac*, 70.)

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In the resolution of the twelve judges, in 1632, it was determined in England, "that the courts of admiralty may inquire of and redress all annoyances and obstructions that are or may be any impediment to navigation, &c., and *injuries done there which concern navigation on the sea.*"

Hence, "the impinging on an anchor or other *injurious impediment negligently* left in the way," has always been considered as coming within the category of maritime torts, having their remedy in the courts of admiralty. (See 2 Brown Civ. and Adm. 203.)

The objection to the jurisdiction of the court is therefore not sustained.

II. The testimony showed that the injury to the steamer was caused by her coming in contact with one of the sight-piles, driven into the channel by the contractors, and left in the situation already stated.

This contract is set forth at length. It showed that the contractors were bound to "provide all necessary machinery, &c., and to furnish (and remove, when done with) all scaffolding and piles that may be used while building."

It is contended by the appellants that they are not liable for the negligence which caused this injury, because the piles were not placed in the channel by their servants, but by those of the contractors; and that the case was not altered by the fact that the contractors were directed to do so by the engineers, who were the servants of appellants.

If the contractors had proceeded to complete their contract, and left the piles in the condition complained of, this defense to the action might have availed the appellants. But as the driving the piles for the legitimate purpose of the erection was

*by authority of the law and in pursuance of the contract, [*217] the contractors had done no wrong in placing them there.

The nuisance was the result of the negligence in cutting off the piles, not at the bottom of the river, but a few feet under the surface of the water. This the contractors were bound to do, after the piles had served their legitimate purpose in the construction of the bridge, and after they had completed their contract. But before this, the railroad company determined to discontinue the erection of the bridge. They dismissed the contractors from the further fulfillment of their contract. Under such circumstances, it became the duty of the appellants to take care that all the obstructions to the navigation, which had been placed in the channel by their orders, and for the purpose of their intended erection, should be removed. The nuisance which resulted from leaving the piles in

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this dangerous condition was the consequence of their own negligence or that of their servants, and not of the contractors.

III. The appellants urge, as a further ground of defense, that this collision took place on Sunday, shortly after the steamboat had commenced her voyage from a wharf, "parcel of the territory of Harford county, in the State of Maryland; that the boat was used and employed by her owners in towing canal boats; and that, when entering on her voyage, those who had her control and management were engaged in their usual and ordinary work and labor—the same not being a work of necessity or charity—contrary to the laws of the State of Maryland."

A statute of Maryland forbids persons "to work or do any bodily labor, or to willingly suffer any of their servants to do any manner of work or labor, on the Lord's day—works of necessity and charity excepted;" and a penalty is prescribed for a breach of the law.

It has been urged, that there was nothing in this provision inconsistent with any of the laws regulating commerce, and that the federal courts should therefore take notice of and conform to the laws of the State.

But assuming this proposition to be true, the inference from it will not follow as a legitimate conclusion; for, if we [* 218] admit * that the master and mariner of a ship or steamboat are liable to the penalty of the act for commencing their voyage from a port in Maryland on Sunday, it by no means follows that the appellants can protect themselves from responding to the owners of the vessel for the damages suffered in consequence of the nuisance.

The law relating to the observance of Sunday defines a duty of a citizen to the State, and to the State only. For a breach of this duty he is liable to the fine or penalty imposed by the statute, and nothing more. Courts of justice have no power to add to this penalty the loss of a ship, by the tortious conduct of another, against whom the owner has committed no offense. It is true, that in England, after the statute of 29, ch. 2d, forbidding labor on the Lord's day, they have, by a course of decision perhaps too obsequiously followed in this country, undertaken to add to the penalty, by declaring void contracts made on that day; but this was only in case of executory contracts, which the courts were invoked to execute. It is true, that cases may be found in the State of Massachusetts, (see 10 Metcalf, 363, and 4 Cushing, 322,) which, on a superficial view, might seem to favor this doctrine of set-off in cases of tort. But those decisions depend on the peculiar legislation

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and customs of that State, more than on any general principles of justice or law. (See the case of *Woodman v. Hubbard*, 5 Foster, 67.)

We would refer, also, to a case very similar in its circumstances to the present, in the supreme court of Pennsylvania, in which this subject is very fully examined by the learned chief justice of that court; and we concur in his conclusion: "That we should work a confusion of relations, and lend a very doubtful assistance to morality, if we should allow one offender against the law, to the injury of another, to set off against the plaintiff that he too is a public offender." (See *Mahoney v. Cook*, 26 Penn. Reps. 342.)

We do not feel justified, therefore, on any principles of justice, equity, or of public policy, in inflicting an additional penalty of seven thousand dollars on the libelants, by way of set-off, because their servants may have been subject * to a penalty [* 219] of twenty shillings each for breach of the statute.

Moreover, the steamboat in this case was sailing on a public river, within the ebb and flow of the tide; she had a coasting license, and was proceeding from a port in one State to a port in another. Has it ever been decided that a vessel leaving a port on Sunday infringes the State laws with regard to the observance of that day?

We have shown, in an opinion delivered at this term, that in other christian countries, where the observance of Sundays and other holidays is enforced by both church and State, the sailing of vessels engaged in commerce, and even their lading and unloading, were classed among the works of necessity, which are excepted from the operation of such laws. This may be said to be confirmed by the usage of all nations, so far, at least, as it concerns commencing a voyage on that day. Vessels engaged in commerce on the sea must take the advantage of favorable winds and weather; and it is well known that sailors (for peculiar reasons of their own) give a preference to that day of the week over all others for commencing a voyage.

In the case of *Ulary v. The Washington*, (Crabbe, 208,) where a sailor justified his departure from a ship in port, because he was compelled to work on Sunday, Judge Hopkinson decided, "that, by the maritime law, sailors could not refuse to work on Sunday—the nature of the service requires that they should do so."

We have thus disposed of the question of law raised in this case, and concur with the district and circuit court in their decision of them.

Some objections have been urged to the assessment of damages, and their amount.

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On this subject there was much contradictory testimony, as usually happens when experts are examined as to matters of professional opinion. The judges of the courts where this question was tried can better judge of the relative value of such conflicting testimony, from their knowledge of places and persons, and they may examine witnesses *ore tenus*, if they see fit.

[* 220] * There was evidence to support the decree; and we can see no manifest error into which the court below has fallen. Appellants ought not to expect that this court will reverse a decree, merely upon a doubt created by conflicting testimony.

The judgment of the circuit court is affirmed, with costs.

ANN R. DERMOTT, Plaintiff in Error, v. ZEPHANIAH JONES.

23 H. 220.

BUILDING CONTRACT—DEPARTURE—NATURE OF THE ACTION.

1. Where, by a special contract for building, the time is fixed within which it is to be completed, the builder is not relieved from his obligation as to time by a change in the work ordered by the owner, unless the builder procures the assent of the owner to an enlargement of the time when he consents to the change in the work.
2. Nor can he recover in such case on a count which sets out the contract specifically and avers performance of it.
3. Neither the extra work ordered, nor the sinking of the foundation, nor the acceptance by the plaintiff of the building afterwards, was any release of the defendant from his obligation to finish within the time limited by the contract.
4. But when that time had passed, and plaintiff, with the knowledge and consent of defendant, continued to do the work specified in the contract, and to do extra work, and when the work, however imperfectly done, was afterwards accepted by the defendant, the law implies that the work done and materials furnished must be paid for.
5. In such case the law implies a promise to pay such remuneration as the benefit conferred is worth, and this may be recovered in an action of *indebitatus assumpsit*.
6. But the defendant may, in such action, set off or recoup the damages sustained by her for the failure of the plaintiff to perform his special contract, and is not driven to an original action against the plaintiff on the contract.

WRIT of error to the circuit court for the District of Columbia.
The case is fully stated in the opinion.

Mr. Brent and *Mr. Poe*, for plaintiff in error.

Mr. Bradley, *Mr. Carlisle*, and *Mr. Badger*, for defendant.

[* 226] * Mr. Justice WAYNE delivered the opinion of the court.
This record shows that the plaintiff and the defendant

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entered into a building contract, under seal, with specifications annexed, on the 22d April, 1851. It was agreed between them, that Jones, the plaintiff, should do in a good, substantial, and workmanlike manner, the houses, buildings, and work of every sort and kind described in a schedule annexed to the contract, of which it was a part; that he should procure and supply all the materials, implements, and fixtures, requisite for executing the work in all its parts and details; and that the stores fronting on Market Space, and the warehouse on Seventh street, should be finished and ready for use and occupation, and be delivered over to the defendant, on the first day of October after the date of the contract, and all the rest of the work on the first day of December afterward. The defendant agreed, upon her part, to pay the plaintiff for the performance of the work, and for the materials furnished, twenty-four thousand dollars by installments: five thousand dollars on the first day of July, 1851; five thousand dollars on the first day of October following; it being expressed in their contract, *that the stores and warehouse were then to be delivered to the defendant ready for use and occupation*; and that the residue of the twenty-four thousand dollars was to be paid to the plaintiff on the first day of January, 1860, with interest upon four thousand of it from the first day of May, 1851, and with interest on ten thousand dollars from the first day of December, 1851. We do not deem it necessary to notice the other covenants of the contract, as they have no bearing upon the case as we shall treat it.

The suit as originally brought is an action of debt for [227] the recovery from the defendant of the second installment of five thousand dollars, and for the value of certain extra work done and materials furnished by the plaintiff for the defendant's use. The original declaration contains four counts: first, charges the defendant in the sum of five thousand dollars for work and labor done, and materials furnished and used by her in the erection and finishing certain stores and buildings in the city of Washington; second, for a like sum paid by the plaintiff for the defendant; third, for a like sum had and received; and fourth, for a like sum paid, laid out, and expended by the plaintiff for defendant at her request. The defendant pleaded to the declaration four pleas: first, that she was not indebted as alleged; second, a special plea setting out in detail a contract under seal, with the plaintiff, for the erection of such buildings as are mentioned in it, and for the completion of them—protesting that the plaintiff had not complied with the terms of the same, and declaring that the sum of five thousand dollars claimed by the plaintiff was the second install-

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ment, which, by the contract, was to be due and payable to the plaintiff on the first day of October, 1851, and denying that the buildings were done by that day, or that any claim for the five thousand dollars had accrued before the bringing of the suit, by reason of any contract or agreement different from the special contract, or for any consideration other than the five thousand dollars claimed in the declaration. In the third plea, the identity of the sum sued for with the second installment is reaffirmed, payable on the 1st of October, 1851, upon condition that the buildings and stores should be completed and ready for use by that day—averring performance on her part of the conditions and covenants of the contract, and non-performance on the part of the plaintiff, especially his failure to complete and have ready for use the warehouse and stores by the time specified. The fourth plea refers to the special contract, avers performance on her part, non-performance on the part of the plaintiff, and especially, that he had not finished and completed the buildings and stores by the day specified in the contract, or at any time, either before or after that day. At this point of the pleading the plaintiff applied to be permitted to amend his declaration, and added to it four counts. The first sets out in detail the special contract referred to in the defendant's second, third, and fourth pleas; avers performance generally, on his part, and non-performance on the part of the defendant. The second count is the same as the first, down to the averment of performance by plaintiff inclusive, and then it avers that the defendant departed from the stipulations of the contract, and required the plaintiff to do additional work, and to furnish additional materials, whereby the defendant delayed the plaintiff, and prevented him from completing the buildings by the time agreed, which the plaintiff would otherwise have done. It is then averred that, notwithstanding the additional labor, the plaintiff had completed the work in a reasonable time after the first day of October, 1851, to wit: on the 4th December following, and that the defendant then accepted the same, whereby the second installment of \$5,000 became payable. The third count is substantially a repetition of the original declaration, and the fourth claims \$10,000 for work and labor done, and for a like sum laid out by the plaintiff for the defendant, from all of which his right of action had accrued before it was instituted.

The defendant filed three pleas to the first count of the amended declaration: 1st, that she was not indebted as was alleged; 2d, that the plaintiff had not performed the special agreement; and 3d, that he had not performed the condition precedent of the con-

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tract, to complete the building, which he had agreed to do by the first day of October, 1851. To the rest of the count the defendant demurred. As the verdict of the jury and the judgment rendered for the plaintiff are upon the first amended count, contrary to instructions asked of the court by the defendant, we shall not notice the subsequent pleadings and proceedings in the case, and will confine ourselves to what we consider to have been the legal rights of the parties under the original declaration and the first amended count. The evidence shows that the three stores and the warehouse were not finished by the 1st of October, 1851. It is also proved that *the special contract had been departed [* 229] from in the course of its execution; that the defendant insisted that alterations and additions should be made in the buildings after they were begun, contrary to the specifications of the special contract, and that the plaintiff had yielded to her requirements. It may have delayed the completion of the stores and warehouse, as it increased the work to be done; but it having been assented to by the plaintiff without any stipulation that the time for performance of the whole was to be delayed, it must be presumed to have been undertaken by the plaintiff to be done, as to time, according to the original contract. The sinking of the wall probably caused the delay, but that cannot give to the plaintiff any exemption from his obligation to finish the stores and warehouse on the 1st of October, without further proof as to the cause of it; nor could it in any event entitle him to an instruction from the court that he might recover under a count or a special contract, in which he avers that the work had been completed by him on the 1st of October, in conformity with it. The defendant in the court below, plaintiff in error here, to maintain the issues on her part, and to reduce the damages claimed by the plaintiff, introduced witnesses to show that the work, though it had been done, had not been so in a skillful and workmanlike manner, and that the materials used for it were of an inferior kind, especially in the construction of the store wall, and that it was so deficient in other particulars that she had been put to a large expense to make the buildings fit for use and occupation, which amounted to ten thousand dollars. The plaintiff gave rebutting testimony, and then the defendant prayed the court to instruct the jury, "that if the three stores and warehouse were not finished fit for use and occupation, and delivered to her on the 1st of October, 1851, but were at the time when they were delivered wholly unfit and unsafe for occupation, with the walls of some of them sunken out of plumb, and cracked, and in danger of falling, so as to be utterly ur

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antable, then the plaintiff was not entitled to demand and recover in this order the said sum of \$5,000, as the stipulated installment which the special contract purports to make payable on [* 230] the 1st October, 1851, but **that the plaintiff was entitled to recover only the value of his work, after deducting the cost and expense incurred by the defendant in repairing the stores and warehouse, to render them fit for occupation, but that the plaintiff, as claimant, was entitled only to nominal damages.*

Also, if the defendant did not, at any time whatever, execute and finish, ready for use and occupation, and deliver in that state and condition to the defendant, the stores and warehouse, but had delivered them over to the defendant in a state wholly unsafe and unfit for use, and untenable, &c., &c., and *that the defendant had been obliged to reconstruct the walls, and to refix the buildings, so as to fit them for use and occupation, at her own cost and charges, then that the defendant may recoup or deduct the same against the plaintiff's claim for the said installment of five thousand dollars claimed in the suit, or the value of the work done by the plaintiff upon the stores and warehouse; but that, in all events, the plaintiff could only recover nominal damages.*

These instructions the court refused to give, without the following qualifications:

"If the jury shall find from the evidence that the plaintiff, Jones, has executed the work according to the specifications forming a part of the contract, in a skillful, diligent, and careful and workmanlike manner, and that his performance of it was with the knowledge and approbation of the defendant, then they should find for the plaintiff the said sum of five thousand dollars, with interest from the date of the delivery of the stores and warehouse to the defendant."

The defendant excepted to the refusal of the instructions as they had been prayed for, and to the qualifications of them as they were given to the jury.

There is error in this instruction. The count and the plea of the defendant, and the instruction asked, raised the construction of the special contract, whether or not the right of the plaintiff to recover the second installment did not depend upon the completion of the stores and warehouse by the 1st of October, 1851; whether that was not a condition precedent, or a case in which the parties had agreed—one to deliver the buildings finished, according [* 231] to the special *contract, and the other to pay the second installment concurrently, if they were then so delivered. A failure by the plaintiff to finish and deliver on that day is fatal

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to a recovery upon the special contract. The plaintiff in the first amended count declares upon it as such, avers his performance accordingly, and the proof is that he had not so performed. We infer, from the whole contract, that it was the intention of the parties that the performance of the work was to be a condition precedent to the payment of the second installment. There is no word in the contract to make that doubtful.

The plaintiff undertook to furnish the materials and to construct the buildings, according to specifications. Part of them were to be finished, and to be delivered to the defendant, on the 1st of October, 1851, and the residue on the 1st December afterwards. For the whole, the defendant was to pay \$24,000—\$5,000 on the 1st of July, 1851; \$5,000 on the 1st of October, 1851, if the stores and warehouse were then finished for use and occupation, and delivered over on that day to the defendant; and if that was done, then the balance of the \$24,000 was to be paid on the 1st of January, 1860, with the interest, as mentioned in the special contract.

The words of the contract for payment are, "in consideration of the covenants, and their due performance." Such words import a condition. It is difficult at all times to distinguish whether contracts are dependent or independent; but there are rules collected from judicial decisions, by which it may be determined. We have tested the correctness of them by an examination of several authorities.

"When the agreements go to the whole of the consideration on both sides, the promises are dependent, and one of them is a condition precedent to the other." Such is the case with the special contract with which we are now dealing. "If the agreements *go to a part only of the consideration on both sides*, the promises are so far independent. If money is to be paid on a day certain, in consideration of a thing to be performed at an earlier day, the performance of that thing is a condition precedent to the payment; and if money is to be paid by installments, some before a thing shall be done and some when it is **done*, the doing [* 232] of the thing is not a condition precedent to the former payments, *but is so to the latter*. And if there be a day for the payment of money, and that comes before the day for the doing of the thing, or before the time when the thing from its nature can be performed, then the payment is obligatory, and an action may be brought for it, independently of the act to be done. Concurrent promises are those where the acts to be performed are simultaneous; and either party may sue the other for a breach of the contract, on showing, either that he was able, ready, and willing to do his act

at a proper time and in a proper way, or that he was prevented by the act or default of the other contracting party." (2 Parsons on Contracts, ch. 3, 189.)

The first installment was to be paid on an appointed day, in consideration of the work to be begun; and the second installment was to be paid on a subsequent day, if the work should then be finished and delivered over to the defendant, ready and fit for use and occupation. Before that day it could not have been demanded; on that day, the work having been performed, it might have been. The evidence shows that the work had not been done on the 1st of October, 1851, and was not finished until the 1st of December.

The plaintiff avers in his first amended count that he had, on his part, complied with his undertaking in the special contract. The issue upon it is, that he had not done so, and he gave no proof to sustain the averment.

The evidence entitled the defendant to a verdict on that count; but the court, without regard to the time fixed upon for the work to be finished, instructed the jury, that if the work had been done according to the specifications forming a part of the contract, in a skillful and workmanlike manner, or if his execution of it was with the knowledge and approbation of the defendant, then they were to find for the plaintiff the sum of five thousand dollars, with interest from the date of the delivery of the stores and warehouse. It must be obvious that this instruction makes between the parties a different contract from that into which they had entered, and one different from that the plaintiff had declared upon.

[* 233] *The plaintiff gave no evidence to support the count; but there was evidence showing the reverse of performance on his part. For this error in the court's instruction to the jury upon the first amended count, we shall remand the case for another trial upon the plaintiff's original declaration in debt with the common counts, as in *indebitatus assumpsit*.

We do not consider that the plaintiff's right to recover upon that declaration was in any way affected by the extra work which was done upon the requisition of the defendant, or by the increase of materials which he furnished for that purpose; or that the sinking of the foundation of the buildings excused him from finishing the work by the time specified; or that the acceptance of the buildings by the defendant as they had been constructed by the plaintiff was any release of the plaintiff from his undertaking to finish them in the time specified in the contract. But after that time had passed, the plaintiff continued, with the knowledge and permission of the defendant, and also with the knowledge of her.

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superintending architect, to do the work specified in the contract, and also to do the extra work, and to furnish the materials necessary for both. And when the work was done by the plaintiff, however imperfectly that may have been, the defendant accepted it.

The law in such a case implies that the work done and the materials furnished were to be paid for. The general rule of law is, that while a special contract remains open—that is, unperformed—the party whose part of it has not been done cannot sue in *indebitatus assumpsit* to recover a compensation for what he has done, until the whole shall be completed. This principle is affirmed and acted upon in *Cutter v. Powell*, 6 Term Reports, 320; also in *Hulle v. Heightman*, 2 East. 245, and in several other cases.

But the exceptions from that rule are in cases in which something has been done under a special contract, but not in strict accordance with that contract. In such a case, the party cannot recover the remuneration stipulated for in the contract, because he has not done that which was to be the consideration of it. Still, if the other party has derived any benefit from the labor done, it would be unjust to allow him to retain *that [* 234] without paying anything. The law, therefore, implies a promise on his part to pay such a remuneration as the benefit conferred is really worth; and to recover it, an action of *indebitatus assumpsit* is maintainable.

Such is the law now in England and in the United States, notwithstanding many cases are to be found in the reports of both countries at variance with it. It was recognized by this court to be the existing rule in the case of *Slater v. Emerson*, 19 Howard, 224, 239.

The difference between the rule now and in earlier times, it is believed, has caused much of the difficulty in the establishment of the present rule. Formerly it was held, that whenever anything was done under a special contract not in conformity with it, the party for whom it was done was obliged to pay the stipulated price; but that he might resort to a cross-action, to indemnify himself for the deficiency in the consideration. *Blair v. Davis*, 1794, cited in 7 East. 470. See *Smith's L. Cases*, in the notes following the case of *Cutter and Powell*, 2d vol., for a full description, historical and chronological, of the rule as it now prevails and as it formerly was.

The rule as it now exists has been recently discussed and affirmed in the Queen's Bench, in the case of *Munroe v. Phelps and Bell*, 8 Ellis and Blackburn, 739; 92 English Common Law.

It has been the rule in the courts of New York for more than

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thirty years. In the case of *Jewell et al. v. Schroepnell*, 4 Cowan, 564, it was decided, that if there be a special contract under seal to do work, and it be not done pursuant to the agreement, whether in point of time or in other respects, the party who did the work may recover, upon the common counts in *assumpsit*, for work and labor done. If, when the time arrives for performance, the party goes on to complete the work, with the knowledge of his employer, it was evidence of a promise to pay for the work. So if the employer does not object.

This rule prevails also in Massachusetts, in Pennsylvania, and in several of the other States. Also in Alabama, as may [* 235] * be seen in the case of *McVoy v. Wheeler*, 6 Porter, 201.

It is discussed, with a very accurate discrimination of its application, in the 2d vol. of Professor Parsons upon Contracts.

In the trial of such an action, where the defense is not presented as a matter of set-off, arising on an independent contract, but for the purpose of reducing the plaintiff's damages, because he had not complied with his cross obligations arising on the same contract, the defendant may be allowed a recoupment from the damages claimed by the plaintiff for such loss as she shall have sustained from the negligence of the plaintiff. Such evidence is allowed to prevent circuity of action, and to prevent further litigation upon the same matter. It may be well to say, that the court allowed a recoupment in *Green and Biddle*, 8 Wheat., 1, to a disseizor, who was a *bona fide* occupant of land, for the improvement made by him upon it against the plaintiff's damages. But such recoupment cannot be claimed unless the defendant shall file a definite statement of his claims, with notice of it to the plaintiff, sufficiently in time before the trial term of the case to enable the latter to meet the matter with proof on his side.

We have pursued the case in hand further than may have been necessary; but it was thought best to do so, as the points now here ruled have not before been expressly under the consideration of this court.

The judgment given in the court below is reversed; and we shall order that the case shall be remanded to it, with directions for its trial again, pursuant to our rulings in this opinion.

Hooper v. Scheimer.

NATHAN E. HOOPER and others, Plaintiffs in Error, v. JACOB SCHEIMER.

23 H. 235.

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EJECTMENT—REGISTER'S CERTIFICATE NO TITLE.

1. It is the settled doctrine of this court that no action of ejectment can be sustained in the federal courts on a certificate of entry in the land office. Where the statutes of the State have provided otherwise, it is only binding on the State courts, and not on the federal courts.
2. In all courts of common law the patent from the United States carries the fee, and is the best title known to such courts.

WRIT of error to the circuit court for the eastern district of Arkansas. The case is stated in the opinion.

Mr Stillwell, for plaintiff in error.

Mr. Hempstead, for defendant.

* Mr Justice CATRON delivered the opinion of the court. [* 248]

An action of ejectment was brought in the circuit court of the United States for eastern district of Arkansas, founded on an entry made in a United States land office. This was the only title produced on the trial by the plaintiffs.

The defendant held possession under a patent from the United States to John Pope, (governor, &c.,) with which the defendant connected himself by a regular chain of conveyances. The circuit court held the patent to be the better legal title, and so instructed the jury, who found for the defendant; and the plaintiffs prosecute this writ of error to reverse that judgment.

* By the statute of Arkansas, an action of ejectment [* 249] may be maintained where the plaintiff claims possession by virtue of an entry made with the register and receiver of the proper land office of the United States. Ar. Digest, 454.

This court held, in the case of *Bagnell et al. v. Broderick*, (13 Peters, 450,) "that congress had the sole power to declare the dignity and effect of a patent issuing from the United States; that a patent carries the fee, and is the best title known to a court of law." Such is the settled doctrine of this court.

But there is another question, standing in advance of the foregoing, to wit: Can an action of ejectment be maintained in the federal courts against a defendant in possession, on an entry made with the register and receiver?

It is also the settled doctrine of this court that no action of ejectment will lie on such an equitable title, notwithstan

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State legislature may have provided otherwise by statute. The law is only binding on the State courts, and has no force in the circuit courts of the Union. *Fenn v. Holme*, (21 How. 482.)

It is ordered that the judgment be affirmed.

No. 60 depends on the same titles and facts and instructions to the jury as are set forth in 59; and the same verdict and judgment were given in the circuit court.

We order it to be affirmed likewise.

THE UNITED STATES, Appellants, v. ELLEN E. WHITE, Administra-
trix of Charles White.

23 H. 249.

CALIFORNIA LAND GRANTS.

1. Where it appears that a valid grant has been made by the Mexican government, the courts will not permit the authority of the federal government to be interposed against a claimant on the ground that another claimant has a better right. In such case the United States has no interest.
2. But where the court below has permitted the United States to set up the rights of a third party against claimant, this court will reverse and remand the cause, that the conflicting rights of the adverse claimant may be contested according to the provisions of section 13 of the act of March 3, 1851.

APPEAL from the district court for the northern district of California. The case is well stated in the opinion.

Mr. Black, attorney general, and *Mr. Crittenden*, for appellants.

Mr. Cushing and *Mr. Phillips*, for appellee.

[* 253] * Mr. Justice GRIER delivered the opinion of the court.

It is clear, from the evidence in this case, that, as against the United States, either Ortega or Miranda has a just claim to a confirmation of his title to the tract in dispute. But whether Ortega was landlord, and Miranda his tenant, or which of the claimants has attempted to overreach the other, are questions in which the government has no interest. The United States officers are not bound to settle this dispute between these parties in these proceedings. Nor should either party be permitted to carry on their litigation, by assuming to act for the government, and thus take the advantage of their opponents, by fighting under its shield and at its expense. The district attorney of California had neither interest nor authority to represent Miranda in order to defeat Ortega; nor can this court be thus compelled, on an appeal by the attorney

general, to become the arbiters of disputes in which the government has no concern.

The patent issued in pursuance of the act of congress which authorizes these proceedings, is conclusive only between the United States and the claimants. It does not affect the interest of third parties.

The act of congress (3d March, 1851, section 13) points out the mode in which contesting claimants may litigate their respective rights to a patent from the government.

Instead of an appeal to this court to settle the rights of Miranda in a proceeding in which he is no party, the claimants under him, if there be any, should proceed in the mode pointed out by the act, which provides: "That if the title of the claimant to such lands shall be contested by any other person, it shall and may be lawful for such person to present a petition to the district judge of the United States for the district in which the lands are situated, plainly and distinctly setting forth his title thereto, and praying the said judge to hear and determine the same; a copy of which petition shall * be served upon the adverse party, [* 254] thirty days before the time appointed for hearing the same. And it shall and may be lawful for the district judge, upon the hearing of such petition, to grant an injunction to restrain the party at whose instance the claim to the said lands has been confirmed, from suing out a patent for the same until the title thereto shall have been finally decided; a copy of which order shall be transmitted to the commissioner of the general land office; and thereupon no patent shall issue until such decision has been made," &c.

It appears from the record that Valentine, who purchased the title of Miranda at sheriff's sale, had filed his claim before the board of commissioners for confirmation, and afterwards withdrew his petition. Now, if Miranda or his assignee makes no claim; if he admits the tenancy, and does not allege that Ortega has fraudulently overreached him, the government surely has no right to claim that the land shall be considered as part of the public domain. It cannot set up Miranda to defeat Ortega, or the contrary, admitting, as it must, that either of them can show a claim worthy of confirmation in the absence of the other. Nor can third persons be admitted to interfere to use the claim of one to defeat the other.

If the heirs or assigns of Miranda object to the issuing of the patent to Ortega or his assigns, their remedy is clearly pointed out. They can have their rights tried where the witnesses are known,

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where they may be examined *ore tenus* before the court, or before a jury, if the court chooses so to order. They have a far better tribunal to settle this question than if they were permitted to appeal to this court, to guess out the truth from conflicting depositions.

Now, if this court should enter a judgment affirming that of the district court, it would appear as if we had decided the title of Ortega to be superior to that of Miranda, and that Miranda was the tenant of Ortega. This we are unwilling to do; for, if there be *bona fide* claimants of the Miranda title, such a judgment might seem to conclude them. Nor can we reverse the judgment, for this would imply that we considered Miranda had the better [* 255] title, and that he or his assignees * might be justified in attempting to get the judgment of this court in their favor, in this oblique and irregular manner, under the protection of the attorney general.

We have concluded, therefore, to remand the record to the district court, with directions to suspend further proceedings till the heirs or assigns of Juan Miranda, if they see fit so to do, may have an opportunity to contest the claim under Ortega, according to the provisions of the thirteenth section of the act of 3d March, 1851, entitled, "An act to ascertain and settle the private land claims in the State of California," and have such further proceedings as to justice and right may appertain.

And now, to wit, May 1, 1860, the court having reconsidered the opinion and order before made in this case, do now order and adjudge that the decree of the district court in favor of the appellees be reversed and set aside, and the record remitted for further proceedings in the case.

We do this that the district court may not be trammelled in their future consideration of the case on all its merits, but without intimating an opinion as to the validity of the grant to Antonio Ortega. It is due to the attorney general to say that, on the argument of this case, he challenged this grant as fraudulent; and it is because we do not think the whole evidence on that point was fully developed on the former trial below, that this order is made.

THE UNITED STATES, Appellants, v. WILLIAM BENNITZ.

23 H. 255.

CALIFORNIA LAND GRANTS—SUTTER'S TITLE.

This court adheres to its decision in the case of Nye and Bassett, (reported in 21 How. 408, 412; 3 Miller, 62, 64,) that Sutter's general title was invalid.

APPEAL from the district court for the northern district of California. The facts are sufficiently stated in the opinion.

Mr. Stanton, for the United States.

Mr. Benham and *Mr. Gillet*, for the appellee.

* Mr. Justice CAMPBELL delivered the opinion of the court. [* 261]

The claimant applied to Micheltorena, in 1844, for a concession of five square leagues of land, lying in the valley of the Sacramento river, and bounded on the west by that stream. The petition was referred to Captain Sutter, who reported that the land was vacant.

The secretary reported, that the governor having deferred any action upon petitions like the present, until he could make a visit to the region of the Sacramento and San Joaquin, it would be proper to dispose of this in the same manner.

* The governor so ordered, authorizing the applicant to [* 262] take provisional possession, until he could make his visit.

The suit of the claimant was submitted to the board of commissioners on this testimony, and it was rejected, as invalid.

Upon appeal to the district court, the claimant proved that he was a soldier in the war of Micheltorena, and an officer in one of the companies of Sutter. That the governor acknowledged his services in that war, and verbally recognized the validity of his claim for the land specified, and that it would be perfected by means of the "general title" of Sutter. The claimant also proved, that in March, 1845, two persons went upon the land, to make improvements under his claim. That one of them shortly after retreated, from fear of the Indians; that the other (Julien) made some improvement and cultivation, and occupied the land twelve or fifteen months, when he was killed by them. In the case of the United States v. Reading, 18 How. 1, it was proved that Julien occupied the land of that claimant.

The merits of the claims arising under the general title of Sutter have been discussed in the cases of Nye and Bassett, reported in 21

The United States v. Rose.

How. R. 408, 412. This claim is in all respects similar; and, for the reasons assigned in those cases, is invalid.

Decree reversed. Cause remanded, with directions to dismiss the petition.

THE UNITED STATES, Appellants, v. JOHN ROSE and GEORGE KINLOCK.

23 H. 262.

CALIFORNIA LAND GRANTS—SUTTER'S CLAIM.

This court re-examines the question of the validity of the "general title of Sutter," and holds that it was the offspring of an improper agreement of Micheltorena to procure Sutter's assistance in his contest for power, in which he was overthrown, and this act of his was never recognized by the departmental assembly, with whom he was at war, nor by the Mexican government, who acquiesced in his overthrow. It is not, therefore, a claim sustained by the Mexican government or supported by its laws, and is not protected by the treaty of Guadalupe Hidalgo.

APPEAL from the district court for the northern district of California. The facts of the case are sufficiently stated in the opinion.

Mr. Stanton, for the United States.

Mr. Crittenden and *Mr. Benjamin*, for appellees.

[* 265] * Mr. Justice CAMPBELL delivered the opinion of the court.

The appellees were confirmed in a tract of land in Yuba county, California, containing six square leagues, bounded north by the Yuba river, west by the eastern line of Captain Sutter's land, south by Johnson's rancho, and easterly for quantity.

[* 266] * The original claimant is John Smith. He was examined as a witness, and testifies that he was a naturalized citizen of Mexico. That in September, 1844, he petitioned the governor of California for the land, and obtained a favorable report from Captain Sutter, and in 1845 received from the latter a copy of the "general title," which the governor had authorized him to give. That in 1844 he built a house upon the land, planted an orchard of fruit trees, and in that and the following year inclosed a field by ditches, and cultivated it, and that he had there a stock of cattle. He says he resided on the land until 1848, when he sold it to persons under whom the claimants derive their claim.

To account for the non-production of any documentary evidence, he says that the petition and report, with a copy of the general title, were lost in the Sacramento river in 1845; that subsequently he obtained another copy, and this, with his naturalization papers,

was sent to Monterey, to be laid before the departmental assembly, but that they were never returned to him. Bidwell testifies that he prepared a petition for Smith to Sutter, representing the loss of his papers, and asking for another copy of the title, and that Sutter admitted the claim. He testifies that Smith cultivated the land.

The two depositions of Sutter show that he recognized the claim of Smith to have the benefit of the general title, and that he gave him copies, as stated by the other witnesses. Other testimony in the record disproves the statements of these witnesses in reference to the improvement of the land, and shows satisfactorily that they were made on a different tract of land, and in no connection with this claim.

The "general title of Sutter" was considered by the court at its last term, and its operation declared in the cases of the United States v. Nye and the United States v. Bassett, reported in 21 How. R. 408, 412. The opinion of the court in those cases has been examined in the argument at the bar, and has been re-examined by the court.

The testimony of Sutter in the case of Nye was, that the general title was inclosed to him in a letter by Micheltorena, the governor, by his request. That the governor was blockaded at Monterey, and was in need of military aid, and [* 267] the general title was sent to him upon his advice. That he executed the trust conferred upon him, by giving copies of the title to those "who had rendered meritorious services to the country, and who applied to him." The general title was issued before his men marched from New Helvetia to join Micheltorena, and, in some cases, copies were given before and some after his return from the expedition, "but only to such as he thought deserved it." Governor Micheltorena made a speech to the soldiers, and promised to deliver grants to all "whom he should recommend," "referring as well to those to whom copies had been delivered as to those to whom he should deliver them."

In the cases of Nye and Bassett, it was proved that the claimants were soldiers in the war of Micheltorena, and had taken possession of the land within their claim under a temporary license from the governor. There is no evidence of the kind in this case. The statement of facts in this testimony, and the inferences drawn from it by the court, are corroborated by public documents existing in the archives of California. These show that, in the autumn of 1844, there was an insurrection against the authority of Micheltorena, which terminated in a compact signed at Santa Teresa, the 1st December of that year, by the contending chiefs. Micheltorena

agreed to disband and send away a battalion of infantry, (presidarios,) "with some vicious officers," within three months, and should himself retire to Monterey; that the headquarters of the opposing forces should be at San Jose, and that their expenses should be charged to the department. In that month both parties recommenced preparations for renewing hostilities. On the 24th of December, Alvarado asked Sutter for explanations "in relation to the assembling of men" at his fort, and charged him with the design of "invading the Californias."

He transmitted to Micheltorena a copy of this letter, and arraigned Sutter "for preparing to attack the forces of the north, under the pretext of placing himself in the defense of Micheltorena's [* 268] government, claiming to have relations with * him for this purpose." He says: "Considering the movement of Sutter and his conduct as an arbitrary act of his own, unauthorized by the government, and knowing positively that he is organizing a force, composed of adventurers and Indians, to attack this garrison, I assure your excellency that I am in a condition to make a defense, and to attack him as soon as he marches against this place, to carry out his dark designs."

On the 28th December, Micheltorena replied to a letter from Sutter, in which he says: "I approve in its whole what you say to me in your last. What you may do, I approve; what you may promise, I will fulfill; what you may spend, I will pay. * * * The country calls for our services; our personal security requires it, and the government will know how to recompense all. * * * If you have not left, owing to some event, without the necessity of a new order, when you learn that I am moving from Monterey to San Juan, you will move at once; for I will have well calculated the time to act against them."

On the 12th January, 1845, he addressed a letter to an officer, in which he says: "All which is said to you under this date by Senor Don Sutter, who is now, with arms in hand, defending the rights of the nation, and supporting the departmental government that I exercise, will be duly obeyed by you."

Sutter, under these orders, reached Santa Barbara in the early part of February, with two companies, and placed them under the command of Micheltorena.

On the other hand, Alvarado and Castro, in January, 1845, denounced the governor to the departmental assembly, "that he appointed as commander of armed adventurers the same Sutter, of whom there is sufficient evidence that he seeks to possess himself of the department, attacking the national integrity; a proof that

the country is in danger; and the presumption is, that Governor Micheltorena does not deserve the public confidence." They arraign him, because he had called "to promote civil war in the country the foreigner, (Sutter,) accused before the supreme government of the country as a conspirator against the national integrity, and * because united to more than one hundred [* 269] adventurous hunters, proceeding from the United States, without more fortune than the muzzles of their rifles, he has increased his files, and causing devastation," &c. They asserted to the departmental assembly, as the only legal authority which they and their party recognized, "that General Micheltorena is a traitor to his country, and as such he ought to be presented to the tribunals of the republic, to be judged in accordance with the laws. 2d. That the assembly should in the interim regulate all the branches of the administration. 3d. That they should transmit the charges against the governor to Mexico, by a commission, and ask that the government of the department may be committed to its natives and residents, of sufficient capacity and knowledge for its management.

This communication was referred to a committee of the assembly, who reported that the governor had repudiated the compact of Santa Teresa, and prepared himself to chastise those who had demanded its conditions; that his connection with Sutter was dangerous to the safety of the department, and had deprived him of the support of the citizens, "for there is not a single individual therein," they say, "who, at seeing Don John Auguste Sutter commence a campaign in California, that does not remember that this gentleman has expressed his fatal design of subduing the country."

On the 15th February, the departmental assembly disavowed the authority of the governor, pronounced his office vacant, and called upon Pio Pico, the first member of the assembly, to take charge of the departmental government in the interim.

On the 22d February, 1845, a treaty was concluded between the commissioners of the assembly and of the governor, which was sanctioned by the respective chiefs, in which it was stipulated "that, from this date, the political command of the department is delivered to the first member of the most excellent departmental assembly, because it was so disposed by said body, agreeably to the laws; for which purpose, his excellency General Micheltorena will deliver a circular order in the hands of the chief of the division of the opponents, that * the same be published [* 270] throughout the limits of the department."

It is acknowledged that the governor "could no longer contend,

with his small forces and scanty resources, against the general outbreak of the country;” and therefore he obligates himself to march to San Pedro, thence to be conveyed to Monterey, and thence to some port in the republic of Mexico.

Sutter remained a prisoner in the hands of his enemies. On the 26th of the month, (February,) he addressed a letter to Pio Pico, as governor, in which he speaks of his detention in the city, and attributes it to his connections with Micheltorena. He refers to his relations and duties as an officer, protests that he was ignorant, and deceived as to the cause of the insurrection against Micheltorena, and that he was then convinced of his delusion, and repented of his credulity. He promises obedience to the authorities, offers to place his fort at the disposal of the government, and prays for his release. It does not appear that he was able to return home until the first of April, about which time Micheltorena sailed from Monterey.

Pio Pico remained in charge of the government, as senior member of the assembly, until the 15th day of April, 1846, when he was installed as constitutional governor of the department, pursuant to an appointment made in consequence of the memorial of the assembly on the 27th of June of the previous year.

We have entered into this minute statement of the relations of Sutter to the authorities of Mexico, and especially those in the department of California, in order to estimate with exactness the import of his acts, under the power conferred by Micheltorena, and how far they imposed an obligation upon the public faith of those governments, and upon this government, as their successor.

The authority of Micheltorena to distribute the lands of the department arises in the colonization laws of 1824 and 1828. The object of those laws was to secure for the republic a population composed of industrious, obedient, and loyal [* 271] *citizens who might contribute to its strength and prosperity.

In the distribution of the public domain for this purpose, the political chief was directed to inform himself particularly of the circumstances and condition of every applicant for land; and that his power of selection should not be inconsiderately or corruptly used, he was required to preserve a record of his acts of administration, and to submit reports to the departmental assembly and the supreme government, the approval of one or the other being necessary for their definitive validity.

The claims presented to the land commission of the United States in California, and to this court on appeal by the claimants, under

the "general title of Sutter," exhibit a wide divergence from the essential rules prescribed in the colonization laws. The petition is not preserved in the archives, but was retained by the applicant. The governor declined to act, until he could examine the country of which the colonization is proposed. In the absence of the petition, and without the desired information, under a "supreme pressure of business," he decides suddenly to send to a subordinate and suspected officer the authority to determine the most serious question of administration confided to his care—that of selecting persons who should own and occupy the soil of the department. He does not preserve a record of this act, nor a copy of the paper he issues, nor did he present it to the departmental assembly for its ratification.

We are compelled to seek an explanation of this anomalous exercise of authority, and to examine the conditions attached to this unusual mode of administration; to inquire of the relation which the proposed objects of the favor occupied and were to occupy to the department and its authorities, and the consequences contemplated by the governor and his agent to ensue from their use of this title, to ascertain its signification. We have no doubt that the court may employ this medium of proof for this purpose.

We learn that the treaty concluded at Santa Teresa was an armistice merely, and that Micheltorena, immediately after, *concluded to use the agency and influence of [* 272] Sutter to punish his enemies and sustain his power; and, to increase that influence, issued this "general title." Their alliance was regarded by the departmental assembly as treasonable, and justifying the deposition and expulsion of the governor from the department. Sutter became their prisoner, and was compelled to renounce his connection with his chief to make his peace. His companies were regarded as public enemies, and were disbanded and dispersed. The supreme government acquiesced in the decisions of the assembly, and recognized and commissioned the governor of their appointment.

No indemnity was granted to the adherents of Micheltorena, nor provision made for the fulfillment of his promises to them; nor have we discovered an instance in which their accomplishment was demanded of the succeeding government. Our opinion consequently is, that these acts and promises were not considered in California or Mexico as valid obligations, binding the conscience of the republic; and therefore they are not valid claims under the treaty of Guadalupe Hidalgo.

In some of the instances, Micheltorena granted a permission to

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the applicant to occupy the land provisionally, until he could visit that portion of the department to act upon their petition. It is contended that this license is so far a recognition of the merit of the application, as to impose upon the United States the obligation to accede to it; that it confirmed an interest in the land, that they should perpetuate by a grant.

We agree that every species of title that originated in the rightful exercise of legitimate authority, and existed under the safeguard of Mexican laws at the date of the acquisition of California by the United States, is protected by the treaty of cession. The change of the government does not alter the relations of the inhabitants in this particular. This court is charged with the duty, in the last resort, to recognize the validity of all such claims. But it is the duty of the court to distinguish between rights acquired under the laws and usages of Mexico, and claims depending upon the mere pleasure of those who were in power—between the vested estate and the hope or expectation of favor or bounty. The [* 273] license of the * governor to the applicant to make a temporary occupation, until he could inform himself, so as to act considerably or intelligently, we think, cannot be treated as conferring a property in the land.

We have examined these cases with unusual care, in consequence of the number of the parties in interest and the amount of property involved. Upon the most liberal estimate of the powers of the governor, and the most indulgent view of the claims of the petitioners, we are unable to determine that they are valid.

Judgment of the district court reversed and cause remanded, with directions to dismiss the petition.

THE UNITED STATES, Appellants, v. ANTONIO MARIA OSIO.

23 H. 273.

CALIFORNIA LAND GRANTS.

1. The claim in this case is founded on a grant by Governor Alvarado, which purports to have been authorized by a special order or decree of the president of Mexico, and not under the colonization laws of Mexico. The authority thus delegated must be strictly pursued.
2. The power conferred was a joint power in the governor and departmental assembly; and as the latter never took any part in making the grant or in conferring it, it is void.

APPEAL from the district court for the northern district of California. The case is fully stated in the opinion.

Mr. Stanton, for the United States.

Mr. Gillet, for appellee.

* Mr. Justice CAMPBELL delivered the opinion of the [* 274] court.

* This is an appeal from a decree of the district court of [* 275] the United States for the northern district of California, affirming a decree of the commissioners appointed under the act of the third of March, 1851, to adjudicate private land claims. Every person claiming land in California, by virtue of any right or title derived from the Spanish or Mexican government, is required by the eighth section of that act to present his claim, together with the evidence in support of the same, to the commissioners in the first instance, for their adjudication.

Pursuant to that requirement, the appellee in this case presented his petition to that tribunal, claiming title to the island of Los Angeles, situated near the entrance of the bay of San Francisco, and praying that his claim to the same might be confirmed. As the foundation of his title, he set up a certain instrument or document, purporting to be a grant of the island to him by Governor Alvarado. It bears date at Monterey, on the eleventh day of June, 1839; and the claimant alleged in his petition to the commissioners that the grant was made under certain special orders issued to the governor by the Mexican government. He obtained a decree in his favor before the commissioners, and the district court, on appeal, affirmed that decree; whereupon an appeal was taken, in behalf of the United States, to this court; and the question now is, whether the claim, upon the evidence exhibited, is valid, within the principles prescribed as the rule of decision in the eleventh section of the act requiring the adjudication to be made.

Unlike what is usual in cases of this description, it will be noticed that none of the documentary evidences of title introduced in support of the claim purport to be founded upon the colonization law of 1824, or the regulations of 1828; and for that reason we shall refer to these documents with some degree of particularity, in order that their precise import and effect may be clearly understood.

On the seventh day of October, 1837, the present claimant presented a petition to Governor Alvarado, praying for a grant of the island in question, "to build a house thereon, and breed horses and mules;" representing, in his petition, that as early * as 1830 he had made a similar request, and expressing [* 276] the hope that the grant might be made.

Some further delay occurred in the contemplated enterprise of

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the petitioner, as appears from the fact that no action was taken on his second petition until the first day of February, 1838, when the governor, by an order appearing in the margin of the petition, referred it, not to the alcalde of the district, but to the military commandancy north of San Francisco, for a report. That office was filled at the time by Mariano G. Vallejo, who accordingly reported, on the seventh day of the same month, that the island might be granted to the petitioner; but suggested that it would be well to make an exception in the grant, to the effect that, whenever the government might desire or find it convenient to build a fort on the principal height thereof, it should not be hindered from so doing. With that report before him, the governor, on the nineteenth day of February, 1838, made a decree, wherein he states that he had concluded to grant to the petitioner the occupation of the island in question, "to the end that he may make such use of it as he may deem most suitable, to build a house, raise stock, and do everything that may concern the advancement of the mercantile and agricultural branches—upon the condition that, whenever it may be convenient, the government may establish a fort thereon."

Direction was given to the petitioner, by the terms of the instrument, to present himself, with the decree, not to the office where land adjudications under the colonization laws were usually recorded, but to the military commandancy, that an entry thereof might be made, for the due verification of the same.

No such note of the proceeding was ever made in the office of the military comandante, or in any book containing the adjudications of land titles. But the several documents are duly certified copies of unrecorded originals which were found in the Mexican archives. Their genuineness is controverted by the counsel for the appellants; but we do not think it necessary to consider that question on this

branch of the case, for the reason that the petitioner never [* 277] took possession of the *island under that decree, and does not claim title under it in the petition which he presented to the land commissioners.

All that the decree purports to grant to the petitioner, in any view which can be taken of it, is the right or license to occupy the island for the purposes therein described, subject to the right of the government to enter at any time and appropriate the premises as a site for a military fort; and inasmuch as the petitioner never availed himself of the license granted, or made any improvements on the island under the decree, it is quite clear that he had acquired no interest in the land, by virtue of that proceeding, at the date of

the cession to the United States, which the Mexican government was bound to respect.

Four other documents were introduced by the petitioner, before the commissioners, in support of his claim: 1. A despatch from the minister of the interior of the republic of Mexico, addressed to Governor Alvarado. 2. A petition from the appellee to the same. 3. A duplicate copy of the grant set up in his petition to the commissioners, which is without any signatures. 4. The original grant of the island in question, which purports to be signed by the governor, and to be countersigned by the secretary. Of these, the first three are duly certified copies of unrecorded originals which were found in the Mexican archives.

As exhibited in the transcript, the despatch bears date at Mexico, on the twentieth day of July, 1838. By that despatch the governor was informed that "the president, desiring on the one part to protect the settlement of the desert islands adjacent to that department, which are a part of the national territory, and on the other to check the many foreign adventurers who may avail themselves of those considerable portions, from which they may do great damage to our fishery, commerce, and interests, has been pleased to resolve that your excellency, in concurrence with the departmental junta, proceed, with activity and prudence, to grant and distribute the lands on said islands to the citizens of the nation who may may solicit the same."

In addition to what is here stated, two persons, Antonio *and Carlos Carrillo, are named in the communication, [* 278] to whom, on account of their useful and patriotic services, preference was to be given in making the grants, to the extent of allowing them to select one exclusively for their benefit.

Such is the substance of the despatch, so far as it is material to consider it in this investigation.

On the fifteenth day of February, 1839, the present claimant presented to Governor Alvarado another petition, wherein, after referring to the fact that the island in question had been granted to him during the preceding year, for the breeding of horses, he prays that a new title of possession may be given to him, in accordance with the superior decree, which, as he assumes, empowered the governor to grant, for purposes of colonization, the islands near by, on the coast.

Some idea of the situation of the island, and of the importance which was attached to it in a military point of view, may be gathered from the exposition of the military comandante, made to the governor on the seventeenth day of August, 1837. One of the

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purposes of that report was to recommend that the custom-house established at Monterey should be transferred to the port of San Francisco. Various reasons were assigned for the change; and among others, it was stated that the latter port was impregnable, by reason of its truly military position.

After describing the port, and expatiating upon the advantages which would flow from the transfer, the report goes on to state that near its entrance and within the gulf are several islands, where are found water and a variety of timber most suitable for a fortification; adding that it contains safe anchorages and suitable coves for landing goods and for storehouses, particularly the island of Los Angeles, which is one league in circumference, lying at the entrance of the gulf, and forming two straits with their points—giving their names—so that it is the key of the whole of it, inasmuch as from this very place the coming in or going out of vessels can be prevented with the utmost facility.

Suffice it to say, without repeating any more of its details, that the whole report is of a character to afford the most convincing proof that the public authorities of the territory, as [* 279] * early as August, 1837, fully appreciated the importance of the island, as a necessary site to be retained by the government for the purposes of national defense. Arch. Exh. p. 5.

Grants under the colonization laws were usually issued in duplicates—one copy being designed for the party to whom it was made, and the other to remain in the archives, to be transmitted, with the expediente, to the departmental assembly for its approval. They were in all respects the same, except that the copy left in the office, sometimes called the duplicate copy, was not always signed by the governor and secretary, and did not usually contain the order directing a note of the grant to be entered in the office where land adjudications were required to be recorded.

In this case there is no expediente, other than the one presented with the first-named petition, which is not necessarily or even properly connected with the grant set up by the claimant. Two copies of this grant were produced by the petitioner, both bearing date at Monterey, on the eleventh day of June, 1839, nearly two years after the governor received the before-mentioned exposition of the military comandante, showing the importance of the island to the government as a site for works of defense. They are of the same tenor and effect, and both purport to be absolute grants, without any of the conditions usually to be found in the concessions issued under the colonization laws. As before remarked, the copy not signed, together with the petition, were found in the Mexican ar-

chives; but the original, properly so called, was produced from the custody of the party.

Adjudications of land titles were required by the Mexican law to be recorded. That requirement, however, was regarded as fulfilled, according to the practice in the department of California, when a short entry was made in a book kept for the purpose, specifying the number of the expediente, the date of the grant, a brief description of the land granted, and the name of the person to whom the grant was issued. In this case there is a certificate appearing at the bottom of the instrument to the effect that such an entry had been made, but it is wholly unsupported by proof of the existence of any such record.

* An attempt was made before the commissioners, or in [* 280] the district court, to account for the absence of such record evidence, by showing that a book of Spanish records, of the description mentioned, was consumed by fire, at San Francisco, in 1851; but the recollections of the witness called for the purpose are so indistinct, and his knowledge of the contents of the book so slight, that the evidence is not entitled to much weight. Jimeno, who signed the certificate, was not called, and, in view of all the circumstances, there does not appear to be any ground to conclude that any such record was ever made.

Colonization grants were usually made, subject to the approval of the departmental assembly, and the regulations of 1828 expressly declare that grants to individuals and families shall not be held to be definitively valid without the previous consent of that deputation. No such approval was ever obtained in this case; and it does not appear that the despatch, or order, as it is denominated by the governor, was ever communicated by him to the departmental assembly, until the twenty-seventh day of February, 1840. His message communicating the dispatch, though brief, clearly indicates that the members of the assembly had no previous knowledge upon the subject.

A document, purporting to be an unsigned copy of the grant, and the petition, are all the papers that were found in the archives, except those connected with the first proceeding under which the license to occupy the island was granted. They were loose papers, not recorded, or even numbered, and, in view of all the circumstances, add little or nothing to the probability in favor of the integrity of the transaction. Two witnesses were examined by the claimant to prove the authenticity of the grant. Governor Alvarado testified that his signature to the grant was genuine, and that he gave it at the time of its date. In effect the other witness

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testified that he was acquainted with the handwriting of the governor, and also with that of the secretary, and that they were genuine. Where no record evidence is exhibited, the mere proof of handwriting by third persons, who did not subscribe the [* 281] * instrument as witnesses, or see it executed, is not sufficient in this class of cases to establish the validity of the claim, without some other confirmatory evidence. But the testimony of Governor Alvarado stands upon a somewhat different footing. His statements purport to be founded upon knowledge of what he affirms, and if not true, they must be willfully false, or the result of an imperfect or greatly impaired and deceived recollection. Resting as the claim does in a great measure, so far as the genuineness of the grant is concerned, upon the testimony of this witness, we have examined his deposition with care, and think proper to remark that it discloses facts and circumstances which to some extent affect the credit of the witness. By his manner of testifying, as there disclosed, he evinces a strong bias in favor of the party calling him, as is manifested throughout the deposition. Some of his answers are evasive; others, when compared with preceding statements in the same deposition, are contradictory; and in several instances he refused altogether to answer the questions propounded on cross-examination. Suffice it to say, without entering more into detail, that we would not think his testimony sufficient without some corroboration to entitle the petitioner to a confirmation of his claim.

On the part of the United States the confirmation of the claim is resisted chiefly upon two grounds. It is insisted, in the first place, that the evidence introduced by the claimant to establish the authenticity of the grant is not sufficient to entitle him to a confirmation, and that in point of fact the grant was fabricated, after our conquest of the territory. Secondly, it is contended that the grant, even if it be shown that it is genuine, was issued by the governor without authority of law.

In support of the first proposition, various suggestions were made at the argument, in addition to those which have already been the subject of remark. Most of them were based upon the state and condition of the title papers, the circumstances of the transaction, and the conduct of the parties, as tending to show the improbability that any such grant was ever made. Much stress was laid upon the fact that the grant was never approved by the [* 282] departmental assembly, or any note of it * entered in the office where the adjudications of land titles were required to be recorded. Attention was also drawn to the fact that the

paper produced as the expediente is without any number, which circumstance, it was insisted, furnished strong evidence that they were fabricated, or at least that they had never been completed. To support that theory, an index, prepared by the secretary, and found in the Mexican archives, was exhibited, containing a schedule of expedientes numbered consecutively from one to four hundred and forty-three, covering the period from the tenth day of May, 1833, to the twenty-fourth day of December, 1844, and including in the list one in favor of this petitioner for another parcel of land granted on the seventh day of November, 1844. Reliance was also placed upon the omission of the appellee to call and examine the secretary who prepared that index, and whose name purports to be signed to the grant set up in the petition. Another suggestion was, that, from the nature of the property, it was highly improbable that any private person should desire such a grant in a department where there were vast tracts of fertile land to be obtained for the asking, and that it was past belief that the governor would have been induced to make the grant, especially after the receipt of the exposition of the military comandante, except upon the same conditions as those inserted in the decree of the preceding year. Every one of these suggestions is entitled to weight, and when taken together and considered in connection with the unsatisfactory character of the parol proof introduced by the petitioner, they are sufficient to create well-founded doubts as to the integrity of the transaction. But it is unnecessary to determine the point, as we are all of the opinion that the second objection to the confirmation is well taken, and must be sustained.

Nothing can be plainer than that the governor, in making the grant in question, did not assume to act under the colonization law of 1824, or the regulations of 1828. Were anything wanting beyond what appears in the terms of the grant to establish that proposition, it would be found in the deposition of the governor himself, in his answer to the fourth interrogatory propounded by the claimant. His answer was, that he *made [* 283] the grant by an express order in writing from the general government. He further states, that his predecessors had applied to the general government for such authority, but without success. On coming into office, he renewed the application, and, after considerable delay, he says he received the before-mentioned despatch by the hands of a courier.

Neither side, in this controversy, disputes the authority of the Mexican president to issue the order contained in the despatch. From its date, it appears to have been issued during the adminis-

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tration of General Anastasio Bustamante. He succeeded to the presidency, for the second time, on the nineteenth day of April, 1837, after the capture of Santa Anna in Texas, and remained in office until the sixth day of October, 1841, when he was driven from the capital by the partisans of his predecessor.

At the beginning of his administration he professed to be guided by the principles of the constitution; and from the well-known antecedents of his cabinet, he could hardly have expected to adopt any different policy. His cabinet, however, shortly resigned, and a new one was formed, believed to have had much less respect for the fundamental law. On the ninth day of March, 1838, the minister of the interior of the new cabinet resigned, when Joaquin Pesado, whose name is affixed to this dispatch, was appointed in his place.

After the new cabinet was organized, the policy of the administration was changed; and it cannot be doubted but that, at the date of this dispatch, the president had assumed extraordinary powers, and was in point of fact, to a considerable extent, in the exercise of the legislative as well as the executive powers of the government.

Assuming that the dispatch was issued in pursuance of competent authority, it must be considered as conferring a special power, to be exercised only in the manner therein prescribed. In this view of the subject, it is immaterial whether the power to grant the islands on the coast was vested in the governor before or not, or in what manner, if the power did exist, it was required to be exercised, as the effect of this order, emanating from the [* 284] supreme power of the nation, was to repeal the *previous regulations upon the subject, and to substitute a new one in their place.

Strong doubts are entertained whether the islands situated immediately in the bay of San Francisco are either within the words of the dispatch or the declared purpose for which the power was conferred; but it is unnecessary to determine that point in this investigation.

Waiving that point at the present time, we come to consider the question whether, upon the proofs exhibited, the power was exercised in this case in a manner to give validity to the grant; and that inquiry necessarily involves the construction of the dispatch.

Omitting the formal parts, its effect was to authorize the governor, in concurrence with the departmental assembly, to grant and distribute the lands on the desert islands adjacent to the department to the citizens of the nation who might solicit the same.

By the terms of the dispatch, the power to grant and distribute such lands was to be exercised by the governor, in concurrence with the departmental assembly; by which we understand that the assembly was to participate in the adjudication of the grant. Whenever a petition was presented, the first question to be determined was, whether the grant should be made and the title-papers issued; and, by the plain terms of the dispatch, an affirmative adjudication could not be legally made, without the consent of the departmental assembly. Whether a subsequent ratification of the act by the assembly might not be equivalent to a previous consent, is not a question that arises in this case, for the reason that no such ratification ever took place.

All we mean to decide, in this connection, is, that by the true construction of the dispatch, the act of adjudication cannot be held to be valid without the concurrence of the departmental assembly, as well as that of the governor.

In this respect, the provision differs essentially from that contained in the regulations of 1828, under which the approval of the assembly was an act to be performed after the *expediente* had been perfected, and after the incipient title-papers had been issued by the governor. His action *preceded that of the [* 285] assembly, and in contemplation of law was separate and independent. After the grant was made and executed by the governor, and countersigned by the secretary, it was the duty of the governor to transmit it to the departmental assembly, for its approval; and if it was not so transmitted, it was the fault of the officer, and not of the party.

Other differences between the regulations of 1828 and the provisions of that dispatch might be pointed out; but we think it unnecessary, as those already mentioned are deemed to be sufficient to show that the decisions of this court, made in cases arising under those regulations, have no proper application to the question under consideration.

From the words of the dispatch, we think it is clear that the power conferred was to be exercised by the governor in concurrence with the departmental assembly; and, consequently, that a grant made by the governor without such concurrence was simply void. This view of the question finds support in the Mexican law defining the functions and prescribing the duties of the governor, and those of the departmental assembly. That law was enacted on the twentieth day of March, 1837, and continued in force during the administration under which this dispatch was issued. 1 Arrillago Recop. vol. 1, pp. 202 and 210. Many duties were devolved,

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by that law, upon the governor, and also upon the departmental assembly, where each was required to act independently of the other. But other duties were prescribed, in the performance of which the governor and the assembly were required to act in concurrence. In the latter class, the governor could not act separately, though in some instances it was competent for the assembly to act in his absence.

Concurrent duties, it seems, were usually performed in open session, in which the governor, when present, presided; but he had no vote, except when, from absence or otherwise, the members present were equally divided. The assembly consisted of seven members, chosen by the electors qualified to vote for deputies to the general congress.

Those in charge of the supreme government, or some of them, had been much in public life, and it must be presumed [* 286] * that the dispatch under consideration was not framed without some reference to that law. On examining the words employed in the law, to express and define concurrent action, and comparing them with the words of the dispatch translated "as in concurrence with," we find they are the same in the original language. Further support to the construction here adopted is derived from the declared purpose of the dispatch, as appears in its recitals. Mexican authorities had long dreaded the approach of foreigners to her western coast, and the language of the dispatch shows that its great and controlling purpose was to promote the settlement of the unoccupied islands by trustworthy citizens of the nation, with a view to ward off that apprehended danger. They feared that those islands, especially those further south and nearer to the track of commerce into the Pacific ocean, might become the resort of military adventurers, and be selected by those desirous of invading that remote department as places of rendezvous or shelter; and in the hope of averting that danger, or, in case of its approach, of supplying the means of timely information, they desired that their own citizens might preoccupy those exposed positions. In this view of the subject, the president, no doubt, regarded the power to be exercised under the dispatch as one of importance and delicacy, and might well have desired to prescribe some check upon the action of the governor; and if so, it would have been difficult to have devised one more consonant with the then existing laws upon the general subject, or better suited to the attainment of the object in view, than the one chosen in this dispatch.

For these reasons, we are of the opinion that the governor, under the circumstances of this case, had no authority, without the con-

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currence of the departmental assembly, to make this grant. Whether the persons specially designated in the dispatch as the fit subjects for the bounty of the government stand in any better situation or not is not a question in this case. Having come to the conclusion that the grant is void, it does not become necessary to consider the evidence offered to prove possession. On that point, it will be sufficient to say it is conflicting and unsatisfactory; and, if true, is not of a * character to show any right [* 287] or title in the land under the Mexican government, or any equity in the claimant, under the act of congress requiring the adjudications to be made.

The decree of the district court is therefore reversed, and the cause remanded with directions to dismiss the petition.

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BENJAMIN HANEY and others, Appellants, v. THE BALTIMORE STEAM PACKET COMPANY and others.

23 H. 287.

ADMIRALTY—COLLISION.

1. It is the duty of a sailing vessel to keep her course and a steamer to keep out of the way when approaching each other.
2. It is the duty of a steamer to have a lookout, who shall be assigned to that duty alone.
3. It is the duty of the officer whose watch it is, to be on deck, especially if he knows another vessel is approaching.
4. A violation of any of these rules renders the vessel liable for the consequences.

THIS was an appeal from the circuit court for the district of Maryland, sitting in admiralty. The case is sufficiently stated in the opinion.

Mr. Addison and *Mr. Butler*, for appellants.

Mr. Schley, for appellees.

* Mr. Justice GRIER delivered the opinion of the court. [* 291]

The appellants, owners of a schooner called the William K. Perrin, charge in their libel that between nine and ten o'clock of the evening of 20th of February, 1858, as the schooner, laden with oysters, was on her way down the Chesapeake bay, she was run into and sunk by the steamboat Louisiana; that it was a bright moonlight night, and the schooner, though of only forty-

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three tons burden and deeply laden, could be and was seen at the distance of a mile.

The answer admits the collision and the result of it. It admits, also, the schooner was seen at a distance of two or three miles; that the steamer was proceeding at a rate of fourteen miles an hour, "heading due north," and the schooner holding her course nearly due south. But it alleges as an excuse, that while the steamboat and schooner were meeting on parallel lines, the schooner suddenly changed her course and ran under the bows of the steamer.

This is the stereotyped excuse usually resorted to for the purpose of justifying a careless collision. It is always improbable, and generally false.

There is not the usual conflict of testimony in this case; for the single person on board of the steamer who was able to give any account of the collision, who acted as pilot, and by whose want of vigilance and skill the collision was caused, does not materially contradict, but rather confirms, the testimony of the libelants.

The facts of the case are as follows:

[* 292] *The steamer Louisiana, of eleven hundred tons burden and five hundred horse-power, was on her way coming up the wide bay of the Chesapeake, steering a due north course, between nine and ten o'clock at night. The small heavy-laden schooner is seen two or three miles off, coming in an opposite direction. The captain of the steamer, (whose theory of action appears from his own testimony to be, that all small vessels are bound at their peril to get out of the way of a large steamer carrying the United States mail,) although he had seen the schooner, and knew that the vessels were approximating at the rate of over twenty miles an hour, retires to his cabin. It was his watch and his duty to be on deck as officer of the deck. He leaves on deck one man, besides the colored man at the wheel, to act as pilot, lookout, and officer of the deck. These two persons constituted the whole crew on duty, besides firemen and engineers. This person, who had to perform these treble functions, was the second mate. His theory is, that the best place for a lookout is in the pilot-house, where, he says, "*I generally lean out of the window, and have an unobstructed view.*" Accordingly, as pilot, he remained in the pilot-house to direct the steersman; and as lookout, he occasionally leaned out of the window.

The result shows the value of this theory with regard to the place and person proper for a lookout. The schooner kept on her course, as the rules of navigation required her to do, on the pre-

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sumption that the steamer would diverge from her course so as to leave a free berth to the schooner, as it was the duty of the pilot of the steamer to do so. The boats were approximating at the rate of six hundred yards a minute, or one hundred yards in ten seconds. A slight turn of the wheel of the steamboat, if given in due season, would have left a wide berth for the schooner. But this, by his own account, was neglected by this pilot and lookout till within *ten seconds* or less of a collision; and then the order was to starboard the helm, instead of porting it, in direct contravention of the rules of navigation.

The steamer, it is true, had a right to pass on either side, and it was her duty to keep clear and give a wide berth to the *sailing vessel; but having neglected this duty till the [* 293] danger of a collision was so imminent that it was probable the schooner would be making some movement to avoid destruction, such a movement only increased the danger of a collision.

The man at the wheel of the schooner had his orders to keep steady on his course south. It is proved, without contradiction, that this order was strictly complied with till the pilot or steersman heard the noise of the steamer's wheels; and being warned of her approach by the lookout, he looked under the boom, and discovered the steamer almost on him; when, in order to save his own life and the lives of the crew, he ported his helm and received the blow on the larboard side of the schooner, near the stern, instead of the bow. The point of collision confirms, beyond a doubt, this view of the case.

The hypothesis set forth in the answer to excuse this collision, that the boats were passing on parallel lines, three hundred yards apart, and that, when within one hundred or one hundred and fifty yards of passing each other, the schooner turned round and run herself under the bows of the steamer, is not only grossly improbable in itself, but contradicted by the testimony, and is a mathematical impossibility.

With this pregnant example of the value of the theory of lookouts contended for in this case, let us compare it with the rules established by this court. Without referring to the numerous cases, the correct doctrine on this subject will be found laid down by Mr. Justice CLIFFORD in delivering the opinion of this court in *Chamberlain v. Ward*, 21 How. 570:

"Steamers navigating in the thoroughfares of commerce must have constant and vigilant lookouts stationed in proper places on the vessel." They must "be persons of suitable experience, and actually and vigilantly employed on that duty." "In general,

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elevated positions, such as the hurricane deck, are not so favorable situations as those more usually selected on the forward deck, near the stem." "Persons stationed on the forward deck are less likely to overlook small vessels deeply laden, and more readily ascertain their exact course and movement."

The entire disregard of these rules of navigation by the [* 294] *steamer, and the consequent destruction of property, demonstrate their correctness and utility.

In fine, we are of opinion that the collision in this case, and destruction of the schooner Perrin, was caused wholly by the negligence and inattention to their duties of the officers who navigated the Louisiana, and that the steamboat should be condemned to pay the whole damage incurred by the said collision.

Let the decree of the circuit court reversing the decree of the district court be reversed.

Mr. Chief Justice TANEY dissenting.

I dissent from the judgment of the court. It is a case of collision on the Chesapeake bay, and involves principles and rules of decision of great interest in the navigation of its waters, where sailing vessels and steam vessels are continually meeting and passing each other in the night, as well as in the day. I think it my duty, therefore, to state the principles of law and the evidence in the case, upon which my opinion has been formed.

The rules of law applicable to a case of this description, as established by this court, I understand to be the following:

1. The vessels, whether sailing vessels or steamboats, must be manned and in charge of a crew competent to navigate them on the voyage in which they respectively engage.

2. It is the duty of each vessel to have a lookout, acquainted with his duty, and faithfully discharging it, and stationed at that part of the vessel which will best enable him to see any impending danger, and promptly warn the helmsman of the point from which it is approaching.

3. It is the duty of a sailing vessel when meeting a steamboat to keep on her course, unless she is prevented by the change or direction of the wind; and it is the duty of the steamboat to keep out of her way, passing on the starboard or larboard side, as the steamboat may prefer.

4. Each vessel has a right to act on the presumption that the other knows its duty, and will act accordingly. But if the steam-

boat fails to shape her course to avoid the sailing vessel, [* 295] *in proper time and at a sufficient distance, the steamboat

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is answerable for the disaster, although the collision may in fact have been produced by an erroneous movement made by the sailing vessel in the moment of peril, and intended to avert the impending danger.

5. The distance at which a steamboat should pass must in some degree depend on the wind and weather, and on the light or darkness of the time and the size of the respective vessels. And, in order to excuse an erroneous movement on the part of the sailing vessel, the proximity of the steamboat, and her course and speed, must be such that a mariner of ordinary firmness, and competent skill and knowledge, would deem it necessary to alter his course to enable his vessel to pass in safety. But in order to justify this, the dangerous proximity must be produced altogether by the steamboat.

These principles and rules of navigation are distinctly laid down in the cases of the *Genesee Chief v. Fitzhugh*, 12 How. 461, and the *New York and Liverpool United States Mail Steamship Company v. Rumball*, 21 Howard, 383, 384, and have been recognized and maintained by this court in many other cases of collision between steamboats and sailing vessels. It would be tedious, and is unnecessary, to enumerate them, as they all affirm the same rules of navigation.

I have stated them in separate propositions, because it is of the first importance that they should be clearly defined and understood. And impartial justice requires that they should be administered and enforced where they apply to the sailing vessel, as well as to those propelled by steam. Indeed it is impossible for the steamboat to perform its duty of keeping out of the way at a safe distance, unless the sailing vessel performs its duty by keeping steadily on her course when the wind will permit. And those who intrust their property in sailing vessels, or their cargoes to the care of persons ignorant of their duty, or incompetent in any other respect, have no just right to ask that others who have committed no fault should be compelled to share in their loss.

Keeping in view these established laws of navigation, I proceed to examine as briefly as I can the testimony; and first,
* the conduct and management of the schooner *Perrin*, [* 296] the sailing vessel.

The collision took place near the mouth of the Rappahannock, at about ten o'clock on the night of the 28th of February, 1858. It was a moonlight night, and a vessel under sail, without lights, could be seen at the distance of three or four miles.

The schooner was an oyster-boat, of about forty tons burden and

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about sixty feet long, and eighteen feet beam. She belonged to Philadelphia, and had obtained a cargo of oysters in the Patuxent river, and sailed from the river about two o'clock of the day above mentioned, down the bay, for the capes of the Chesapeake, bound for her home port. It was a cold night, the wind from the north-west, a stiff breeze, nearly fair, but coming rather from the western land. The sails of the schooner were consequently spread out on her larboard side—that is, on her eastern side, as she went down the bay. She moved at the rate of six or seven miles an hour. Her crew consisted of Charles Ogden, captain, and five other persons, including the oystermen on board; and the latter, when not dredging for oysters, assisted in navigating the vessel.

At half past eight o'clock, on the night of the disaster, the captain and all the crew, except the witnesses, William J. Miles and Charles Cory, went below to sleep; and from that time until the collision, no one but these two men were on deck, or assisted in any way to navigate the vessel, and therefore have no knowledge of what led to the disaster.

In weighing the testimony given by these two witnesses, it must be borne in mind that both of them have a direct interest in the result of the case, and will share largely in the damages that they may by their testimony recover from the steamboat. Cory says, that two-thirds of the oysters belong to Miles and himself, and Ogden, the captain, after one-third and the expenses were taken out. Each of these witnesses, therefore, is giving testimony in his own cause to support his own claim; and they are substantially parties prosecuting the suit, although they appear only as witnesses in the record. They may be admissible from necessity. [* 297] But it is a departure and * exception to the general rules of evidence, long and well established in courts of common law and equity, and goes always strongly to their credit; and the facts stated by such witnesses, as well as their manner of stating them, are carefully scrutinized by courts of justice, in considering the case. The wisdom and justice of the common-law rule will, I think, be apparent when we examine the testimony of Cory and Miles.

Corey's account of himself is this: He has been following the water as an oysterman four years and a half, during the oyster season; and on such occasions, when he is not dredging for oysters, it is a part of his duty to help to navigate the vessel and to help to look out, and he is always in one of the watches. But he had never before been down the bay below the Patuxent. He was the lookout, and the only one, in this part of the voyage. He says

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he saw the steamboat when about three or three and a half miles off; that he was walking on the larboard—that is, the leeward and eastern side of the vessel, and saw the steamboat between the night-head and the fore shroud of the schooner; and she was to the leeward, larboard, and eastward; and that, immediately upon seeing her, he said to Miles, the helmsman, “hadn’t you better keep away?” and about five minutes afterwards, asked him again, if he hadn’t better keep away; and receiving no answer to either question, he seems to have supposed that he had performed his whole duty as a lookout; for he appears to have made no further effort to communicate with the helmsman, and to have taken no further concern in the navigation of the vessel, before the collision happened.

It is evident from this testimony, given by the witness himself, that he was utterly unfit for a lookout, and performed none of its duties. He was not at the bow or near the head of the vessel, nor even on the windward side, where the sails would not have obstructed his view ahead, but was walking on her larboard or leeward side, and must have been aft of the foremast, as he first saw the Louisiana between the night-head and fore shroud. This was no place for a lookout, for the foresails and head sails were directly before him, and made it *impossible for him [* 298] to see the bearing or distance of any vessel approaching directly ahead, or on her larboard or eastern bow. And although he swears that he did, notwithstanding these obstacles, see her to the leeward and eastward of his vessel, he obviously contradicts himself, when he immediately after states that he twice advised the helmsman to alter his course more to the east; for if he really thought the steamboat bore to the east of south, his advice to the helmsman was to put the schooner directly in her way, instead of avoiding her; nor can the slightest reliance be placed upon his statement that the steamboat was to the eastward, or that the schooner was standing due south when he first saw the steamboat, or that she did not change her course until she luffed to the west a moment or two before the collision; for he had no compass before him; had never before been in that part of the bay, and under such circumstances could form no accurate judgment of the cardinal points of the compass; it was simply impossible that he could know whether the steamboat bore some points to the east or west of south, or that his vessel was heading due south, or two or three points to the east or to the west of south; or whether she did not vary in her course two or three points as she was approaching the steamboat before she changed directly to the west.

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It would seem that he placed himself on the larboard side under the lee of the mainsail to shelter himself from the cold northwest wind, and in that situation it is literally impossible that he could know the precise course the schooner steered, or the bearing of the steamboat when he first saw her, and as he approached her; and it is equally impossible that he should have given the advice he did to the helmsman, if he really thought the steamboat bore east from the schooner.

The testimony of Miles, the only other material witness for the libelants, will show that he was as unfit for a helmsman as Cory was for a lookout, and that the facts he states are as little to be relied on.

He says he has been following the water as an oysterman thirteen or fourteen years, and accustomed to take the helm for the [* 299] last four or five years; and it does not appear that he * was ever before in that part of the Chesapeake bay; he was standing on the larboard side of the vessel, the same side with the sails, with his right hand on the helm, and from his position could see nothing ahead without going upon one knee, and looking under the boom; and when Corey told him there was a light ahead, he looked under the boom, and saw the Louisiana about one-half or three-quarters of a point to the eastward of the schooner.

Now, when he saw the steamer approaching, it was his duty, according to the repeated decisions of this court, to stand by his helm, with his eye on the compass, and keep the vessel steadily in her course, and rely on the lookout for information as to the approach and bearing of the steamboat. His own course at the time, he says, was due south.

But instead of doing this, he immediately took upon himself the additional duty of lookout, under circumstances that made it impossible he could perform either. He was on his knee from a half to three quarters of an hour before the collision took place, watching the steamboat under the boom of his vessel. He says, indeed, that he did not watch her all the time, but watched his course; yet he tells us the boom was only 3 or 3½ feet from the deck, and therefore, in order to look under it, he was obliged not only to go on his knee, but to bring his head down to within two or three feet of the deck; and in that posture, while watching the steamboat, it was absolutely impossible for him to know the exact course he was then steering, or form a correct judgment of the distance or bearing of the steamboat, for the compass was hid from him by the sides of the binnacle in which it stood, and his view ahead, and on the eastern bow of his vessel, obstructed by the foresail and head

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sails, which were spread out on the same side. And when he speaks of bearings and distances, he speaks, necessarily, not by the compass, but from vague conjectures, and states facts of which he could have no certain knowledge, and was not in a situation to form an opinion upon which any reliance could be placed. He admits that where he stood, with the compass before him, he could not * see the Louisiana, and consequently could [* 300] not see how she bore by the compass.

Again, he says Cory was looking out at the time of the collision, and was a competent lookout; yet his own testimony shows that he did not think so, nor places the slightest confidence in him; for as soon as Cory reported the steamboat in sight, he took upon himself the duty of lookout, as well as helmsman, although he was at the stern of the vessel, and could see nothing ahead except under the boom. And from the time the Louisiana came in sight, he was so absorbed in these double duties, or confused and bewildered by the appearance of the steamboat, that he does not appear to have remembered there was such a person as Cory on deck; he asked no information from him, and did not even hear him when he twice advised him to keep his vessel off; yet Cory was standing within a few feet of him, with nothing but the mainsail between them, and he had heard readily and distinctly when he reported to him that the steamboat was in sight.

He says he kept his course due south. I have already said he could not know the fact, as a large portion of his time was passed in watching the steamboat, with his head in a position which made it impossible for him to see his compass. And with his right hand on the helm, and stooping low on the larboard side to see under the boom, his right arm would naturally and necessarily follow the movement of his body to the larboard, and draw the tiller with it, and cause the vessel from time to time, with such a strong wind pressing on her mainsail, to head towards the west, and edge nearer and nearer to the due north line in which the Louisiana was moving, and thus, by his own incapacity and fault, produce the proximity which so much alarmed him, and induced him suddenly to change his course to the west. It is true, the lookout on board the Louisiana says she appeared to be standing south, and that he did not observe any change until she suddenly luffed to the west. But Captain Russell states, and every seaman knows, that you cannot, in the night, determine the precise course which an approaching vessel ahead is steering; and coming, as this schooner did, with a free wind, she might * frequently [* 301] vary from her general course, from time to time, one or

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two points, for two or three minutes, and the most vigilant lookout on the steamboat fail to discover it or observe it; yet, at the speed at which she was going, she would, by the slightest movement of the helm to the larboard, or the least relaxation of the hold of the helmsman, head more to the west, and approach nearer to the line of the steamboat, and increase the danger of a collision.

Indeed, Miles admits that his vessel did vary a little, but not enough, he says, to take her from her course; he does not, however, tell us how much she varied, nor what variance he thinks necessary to take her from her course, nor how long it continued, nor in what direction. It is obvious, from what he says of his own position and movements, that every variation from her general course must have been towards the west.

I do not think it necessary to comment further on the evidence given by these two witnesses. Testifying in the manner I have stated, and under the influence of a direct pecuniary interest in the result, I cannot think their statements would be entitled to any weight against the steamboat, even if uncontradicted by other testimony; but in all of its essential parts it is contradicted by disinterested witnesses who were on board of the Louisiana, and I proceed briefly to state the testimony of Captain Russell, and Ward, the second mate, who are the only two material witnesses on behalf of the steamboat. The disaster happened in the captain's watch, during which the second mate, Ward, was the lookout, and charged with the running of the vessel; the wheelsman was a colored man, and could not, therefore, be examined as a witness; but it is abundantly proved that he was an experienced wheelsman, and accustomed to perform that duty on steamboats, and was fully competent and trustworthy.

Captain Russell and the mate have for many years been engaged in the navigation of steamboats up and down the bay, at all seasons of the year; are both pilots of long experience, and well acquainted with the dangers to be apprehended, and are accustomed [* 302] to meet and pass vessels at all hours of the night * and of the day. Neither of them have any pecuniary interest in the result of this controversy, and they are both men of undoubted character for intelligence and veracity.

It has indeed been said, that the answer of Captain Russell to the libel, and his testimony as a witness, contradict one another, and that, on that account, credit ought not to be given to his testimony; but I can see no discrepancy between them. In his answer, he speaks in general terms of the disaster and the causes which led to it, and that is all that was proper or usual to state in

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an answer. When examined as a witness, he enters more minutely into the circumstances, and mentions his momentary absence from the deck just before the Perrin changed her course to the west, but there is no contradiction or discrepancy in this; and it is hardly just to a witness to select a detached sentence from the answer, and another from the testimony, to show an apparent contradiction, when the two papers, read throughout, are perfectly consistent with each other, and substantially the same; and in both his answer and his deposition as a witness he supports and confirms the testimony of Ward, the lookout, in every fact material to the decision of the case. Ward says he was stationed in the wheel-house, or pilot-house, as the place is indifferently called; the house is about sixty feet from the bow, upon the upper deck, and elevated about twenty-five feet; he stood by the side of the wheelsman on the larboard side of the house, and the wheelsman on the starboard, about four feet from him; and the compass was in the wheel-house, in front of the wheelsman.

It has been argued that the lookout ought to have been at the bow, and some passages in the opinions of this court in former cases are relied on to support this objection. But the language used by the court must always be construed with reference to the facts in the particular case of which they are speaking, and the character and description of the vessel. What is the most suitable place for a lookout, is obviously a question of fact, depending upon the construction and rig of the vessel, the navigation in which she is engaged, the climate and weather to which she is exposed, and the hazards she is *likely to encounter, and [*303] must, like every other question of fact, be determined by the court upon the testimony of witnesses—that is, upon the testimony of nautical men of experience and judgment. It cannot, in the nature of things, be judicially known to the court as a matter of law. All that the law prescribes is, the rule that the lookout shall be stationed in that part of the vessel where he can most conveniently and effectually discharge the duty with which he is charged. And all of the experienced pilots who have been examined as witnesses in this case, accustomed to the navigation of the bay, well acquainted with the form and construction of the Louisiana, unite in testifying that the place where Ward was stationed was the best and most suitable; and they point out the serious disadvantages that might arise from stationing him at the bow. There can hardly be a rule of law which requires a steamboat to station a lookout in a place where he cannot effectually perform his duty. In a vessel propelled by sails, he is uniformly stationed at the bow,

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because, in any other part of the vessel, his view ahead would be obstructed by the head sails and rigging. But this reason does not apply to steamboats constructed like the Louisiana.

Taking it, therefore, as fully established by proof, that Ward, the lookout, was competent, and stationed in the proper place, I proceed to state his testimony, which is as follows:

He saw the schooner when about three or four miles off. The steamboat was heading a due north course, and the schooner appeared to be heading south, and bore by the compass north half east on the starboard (eastern) side of the steamboat. When the two vessels approached within the distance of 300 or 400 yards, the schooner bore north one point east on the starboard side of the Louisiana; and when within about 150 yards of the schooner, in order to give a wider space in passing, he headed the steamboat north by west, which left the schooner bearing two points east on her starboard bow. He had just steadied his boat in this course when he discovered that the schooner altered her course, and was heading west across the bay, and continued to hold that [* 304] course until the collision took place. The moment he * discovered that the schooner had changed her course, he gave the signal to stop and back, which was instantly obeyed. But the vessels came together before the headway of the steamboat was entirely stopped.

The testimony of this witness, supported as it is by that of Captain Russell, can hardly be impeached by such testimony as that which has been given by such witnesses as Cory and Miles.

And I regard this as the true history of the disaster, and of the movements of the vessels by which it was produced.

The facts established by this proof, that the schooner bore north half east when first seen at the distance of three or four miles, and north one point east when at the distance of about 300 yards, show that, from the causes I have before mentioned, she had not maintained her course due south during that time, but had been luffing and edging to the west, so as to bring her nearer and nearer to the due north line in which the steamboat was steering; for, if they had approached each other in parallel lines, the schooner would have borne more and more to the east, and would have been directly east when they passed, and would therefore, when within 300 yards, have borne more than one point to the east of north. But even then, if she had continued to hold her course due south, and the steamboat had continued hers due north, they would have passed in safety, but nearer, indeed, than a steam vessel of the size of the Louisiana ought to pass so small a vessel as the oyster-boat.

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But when the steamboat changed her course one degree more to the west, it is evident that they would have passed each other not only in safety, but at a convenient and sufficient distance; for, it will be observed, that, for the distance of one hundred and fifty yards at which the steamboat changed her course, she was proceeding slowly, backing with all the force of her machinery, and with so much effect that her headway was nearly stopped when they came in contact. This is proved by the character of the injury inflicted. It is true that the side of the schooner was broken in, and an opening made, through which the water rushed in, and filled and sunk her in a few minutes. The witnesses for the libelants, * who examined the schooner at Norfolk after she had [* 305] been raised and carried into port, say that the blow "had hit the main beam across the break of the quarter, and split it—knocked the knees out from each side of it, and cut her down to light-water mark." But it did not even upset her. Cory, indeed, says that her stern was driven under the water. But Miles, who was at the stern, does not support him. On the contrary, he says the blow threw him to the windward, (that is, to the opposite side,) and that he went up the rigging of his vessel until he got on the bow of the steamboat. He does not intimate that he was in danger of being washed overboard or plunged into the water. Now, with the immense weight and size of the Louisiana, coming stem on, against the broadside of the comparatively slender and frail timbers and planks of this little oyster-boat, if the headway of the steamboat had not been very nearly stopped before she struck the schooner, the injury inflicted must have been much greater than that described by the witnesses. If she had been moving at even one third of her ordinary speed, she would unquestionably have buried this little boat in the water, and passed over her. These facts of themselves show that her rate of speed for these 150 yards, taking it all together, could not have averaged, at the outside, more than four or five miles an hour.

Now, the schooner changed her course to directly west almost simultaneously with the reversal of the engine of the steamboat, approaching her line of movement nearly at a right angle, and was moving from east directly west during the time the steamboat was passing over this 150 yards. She was moving, also, with equal or greater speed, for all of the witnesses agree that she was sailing at the rate of six or seven miles an hour; and when she changed her course to west, she was in full headway, with all sails set, and must have maintained, during that time, at least very nearly the speed at which she had before been sailing; and this being the

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case, she must, in order to bring the vessels into contact, have passed nearly the same distance to the west which the steamboat, while backing, had passed to the north—that is, 150 yards; and consequently, if she had held on her course, would [* 306] * have passed at that distance, or nearly so, to the eastward of the steamboat.

It has, indeed, been said that the collision was immediate after the change of course by the schooner, and the backing of the steamboat; and calculations have been presented to show that it must have been so, because, from the combined speed of the two vessels, taken together, the 150 yards would be passed over in a few seconds. But this argument has no foundation in the evidence; for the steamer was not proceeding at her ordinary speed, but backing all the way, and had nearly stopped when she came in contact with the schooner. And the latter vessel was not meeting her from an opposite direction, but standing directly across her path, leaving the steamboat to pass over these 150 yards, and at the reduced rate of speed of which I have spoken, before the vessels could come together.

In reference to this part of the evidence, it is perhaps, hardly necessary to notice the evidence of Miles, who says they were within thirty yards of the steamboat when he changed his course to the west. No one, I presume, will think that his testimony in this respect is entitled to any weight, when in conflict with the testimony of Captain Russell and the mate, Ward, who were both in a position to see perfectly what was before them, and accustomed, by long experience, to measure distances on the water by the eye, while Miles was looking under the boom of his mainsail with his head near the deck, and his vision obstructed by the sails and rigging of his own vessel. He was in no position to form a correct judgment of distances any more than of bearings; and even Cory contradicts him, and says, that “we did not change our course until we were within 150 yards, if, indeed, we were more than 100 yards from the Louisiana.” He, in effect, corroborates the testimony of Captain Russell and Ward.

It has been said, also, that the steamboat ought to have slowed her speed before she approached so near as 150 yards to the sailing vessel. But this argument loses sight of the fact that, until the schooner changed her course to the west, those on board [* 307] of the steamboat had no reason to suppose that * there was the slightest danger of collision, or any reason for slackening her ordinary speed. They had a right to presume, and indeed were bound to presume, that the schooner would steadily

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hold on the course she was steering, and the steamboat had shaped its course to keep out of her way, and pass her at a safe and convenient distance. And the moment they discovered that the schooner had changed her course, and was heading in a direction that might produce collision, she instantly stopped and backed, and took every measure in her power to avert the danger. But until the change of course by the schooner, there could be no reason and no obligation whatever to slacken her speed; for it can hardly be supposed that a steamboat is bound to stop or slacken her speed whenever she sees a sailing vessel coming in an opposite direction, and wait to see whether she will conform to the rule laid down by this court, and hold her course, or suddenly change it to cross the line in which the steamboat is moving. Such a rule would make steamboat navigation of very little value on the Chesapeake. But unless such is to be the rule, I can see no ground for imputing it as a fault to the steamboat, that she did not slacken her speed until she came within 150 yards, when it is admitted that the schooner did not change her course to the west until she had come within that distance of the steamboat.

As relates to the general rate of speed of the steamboat, no one acquainted with the navigation of the Chesapeake has ever suggested or supposed that it was dangerous to life or property on that wide bay; and there is no evidence from which such an inference can be drawn. The fact that the Louisiana carried the mail, and was obliged to proceed at the rate of fourteen or fifteen miles an hour, in order to fulfill her contract, certainly gave her no rights or privileges beyond those of any other steam vessel, nor exempted her in any degree from the care, caution, and watchfulness, in speed, as well as in everything else, required of others. The fact that a contract was made is perhaps some evidence that the public authorities of the United States, having all the means of information within their reach, were satisfied that the rate of *speed required was not dangerous to the life or [* 308] property of our citizens who are accustomed to navigate the bay.

It is unnecessary to remark upon the testimony given by the captain of the Keyser, which sailed from the Patuxent in company with the Perrin. He was, he says, three-quarters of a mile off, and could in the night, even by moonlight, have no certain and accurate knowledge of the bearing of the colliding objects towards each other as they approached, or the particular incidents of the collision; the more especially as both vessels were ahead of him, and to leeward, and hidden from him by his own sails as he stood

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at his helm. He says, too, that before the collision, he paid very little attention, and what he did see was by looking under his boom.

Neither do I attach any importance to conversations and statements made on board the Louisiana after the collision. Declarations made in conversation are apt to be loose and unguarded—are often misunderstood, and, in my judgment, entitled to very little weight in any case, and least of all in a case like this, where the minds of all had been excited and agitated by the scene through which they had so recently passed.

There is no other evidence in the record which appears to be material to the points I am discussing, and I forbear, therefore, to refer to it. This opinion already occupies more space than I anticipated. But, as the full statement of the testimony cannot be given in the report of the case, I have found myself unable to present the facts truly and fairly, as I understand them, in fewer words.

I fully agree with the court, that the strictest supervision should be held over steamboats. But it is impossible for them to perform the duty of keeping out of the way, unless the sailing vessel is held to the correlative duty of keeping her course. Even-handed justice requires that the law of navigation should be as obligatory upon the sailing vessel as it is upon the steamboat. This is a question of property, and the rights of the parties are to be ascertained and determined by the rules of law. And where the evidence shows, as I think it does, that the Louisiana [* 309] performed her duty, and took *proper measures to keep out of the way, and her efforts were counteracted and defeated by the sailing vessel, and a collision forced upon the steamboat by the incapacity and misconduct of those in charge of the Perrin, I cannot think that the steamboat should be charged with any part of the damage which the sailing vessel brought upon itself. Those who intrust their property on the water to incompetent hands have no just right to complain of disasters, and claim indemnity for losses arising altogether from the incapacity and unfitness of those to whom they have confided it, and still less have Cory and Miles, whose incapacity and misconduct were the sole cause of disaster.

And entertaining this view of the controversy, I dissent from the judgment of the court.

Day v. Washburn.

GEORGE W. DAY and others, Appellants, v. WILLIAM A. WASHBURN
and JOHN A. KEITH.

23 H. 309.

PRACTICE IN SUPREME COURT.

Where a part of the plaintiffs in a suit in chancery appeal, and other plaintiffs do not appeal, nor are otherwise before this court, a motion to dismiss the appeal for that reason is, on account of the peculiar circumstances of the case, ordered to stand over for final hearing upon the merits.

APPEAL from the circuit court for the district of Indiana.

Motion to dismiss made by *Mr. Porter*, as *amicus curiæ*.

* Mr. Justice WAYNE delivered the opinion of the court. [*310]

Albert G. Porter, esquire, a counselor of this court, and who was concerned as counsel in the court below for certain petitioners, claiming an interest in the matter in controversy adversely to the appellants, asked to be permitted, as *amicus curiæ*, to move for the dismissal of this appeal, alleging for cause that it had been irregularly brought to this court, in this particular: that the appeal had been taken only by a part of the complainants; and that such of them as had been omitted were not parties to the appeal.

The record discloses the following facts:

The appellants filed in the circuit court a bill to set aside, as fraudulent, a conveyance of property, and to subject it to the payment of their claims against William A. Washburn, and associated with him as a defendant John A. Keith, the grantee of the conveyance. The bill was separately answered by Washburn and Keith, and proceedings were had in the case, until at December term, in 1858, the issue was made up, upon bill, answer, replication, and exhibits. At that term of the court, [*311] December 21, 1858, a number of persons, claiming also to be creditors of Washburn, filed a petition by their counsel, Hall, McDonald, and Porter, praying to be made parties to the bill, as complainants, and to be permitted to share in such distribution as might be made out of the property charged to have been fraudulently conveyed by Washburn to Keith, in the event of the courts decreeing that it had been so done, and that it was liable for the payment of Washburn's creditors. The court directed these petitioners to be made parties to the bill of the appellants, as complainants, and under that order the decree now appealed from was made.

But before the decree was rendered, the cause was referred to a master, to report the sums due to the creditors, as they were then

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appearing to be so in the original bill and other proceedings of the cause. It was done. Subsequently a decree was rendered, declaring Washburn's conveyance to Keith void and fraudulent. In consequence of it, a large sum was made out of the property and deposited in court for distribution. And the court decreed that it should be ratably distributed between the appellants and those other creditors of Washburn who by its orders had been made parties to the original bill. It is from this decree that the appellants have brought the case to this court. They had insisted, before the court rendered its decree, that, being the original complainants, they were entitled to have their claims paid in full, and that the remainder of the fund might then be distributed, in the discretion of the court, *pro rata*, amongst the other creditors of Washburn. But the court overruled the motion, and ordered the money to be paid ratably to the creditors. It is from this decision and decree that this appeal has been brought, so as to have it decided, whether, in the particular just mentioned, it is not erroneous.

It also appears that the appellants were judgment creditors of Washburn when they filed their bill to set aside his deed to Keith, and that the other creditors, who have been made participants in the fund to be distributed, are not so. And we gather from the proceedings in the cause, that the application to be made [* 312] parties to the original bill was with the view * to defeat the appellants of any legal or equitable priority which they may have acquired for the payment of their claims over the other creditors, either from their being judgment creditors, or from their vigilance in first filing a bill to set aside the conveyance from Washburn to Keith. We do not mean now to decide those points upon this motion, nor any other point connected with the merits of this controversy. All such points will claim the attention of the court upon the argument of the case hereafter. The record also suggests an inquiry, whether those persons who were made parties to the original bill, and who have become by the decree of the court participants in the fund to be distributed, were necessary parties to the bill, or were allowably so, in their then attitude in respect to their claims against Washburn. And in no other way can the question of right between themselves and these appellants in the fund be reached; for the former, having accomplished their purpose, for which they were made parties, are neither willing to appeal from the decree nor to be considered as parties to this appeal.

The record, indeed, suggests many points connected with the real merits of the controversy, and others in respect to proper

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pleadings in equity, which cannot be considered and determined upon a motion to dismiss the appeal summarily for any irregularities in the process by which it has been brought to this court. We therefore refuse the motion for the dismissal of the appeal, allowing it, however, to be brought to the notice of the court again, when the case shall be argued upon its merits.

This course has often been taken by this court upon a motion to dismiss a case, for irregularities in the appeal or writ of error, similarly circumstanced as this is.

THE UNITED STATES, Appellants, v. JAMES NOE

23 H. 312.

CALIFORNIA LAND GRANTS.

Where, in 1841, the governor made a grant, subject to an inquiry as to whether it was vacant, with a condition to furnish a *diseño*, and to inhabit and cultivate the land, and nothing is done under the grant until 1852—no expediente found in the archives; no possession; no approval of the departmental assembly—and the grantee sells his claim two days before his assignee files the claim with the commissioners, it must be rejected.

APPEAL from the circuit court for the northern district of California. The case is well stated in the opinion.

Mr. Black, attorney general, and *Mr. Stanton*, for the United States.

Mr. Benham, for appellee.

* Mr. Justice CAMPBELL delivered the opinion of the court. [* 314]

Robert Elwell, in a petition to Governor Alvarado, that bears date in 1841, represents that he had resided in the country sixteen years, was married to one of the natives, and had a numerous family, and had been employed in commercial business; that his capital had been impaired, and he had been reduced to enlist as a private soldier in the militia, and had served in the year 1838, under the command of the governor, in the south, and had received no compensation. He solicits of the governor, as a generous recompense to his subordinate, and also with a view to promote the progress of agriculture, to confer upon him a concession of a parcel of land situated in the northern frontier, and forming an island in the Sacramento river, eighteen leagues from the establishment of Don Aug. Sutter, containing five square leagues.

The governor, in March, 1841, "in consideration of the services and merits specified," grants the land asked for, the claimant to

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abide the reports, as to whether the land is vacant, with whatever else that is proper, and that he shall furnish the *diseño*, in order to commence the expediente.

Two days before the claim was presented to the board of commissioners in 1852, Elwell conveyed his claim to the appellee. He (Elwell) was examined as a witness, and testifies that he had presented a *diseño* some three months after he had exhibited his petition; that there was no information or formal report [* 315] made to the governor, and that he had never *occupied the land or had judicial possession delivered to him; that there was no officer to perform these duties.

There is some testimony to show that Noe had a tenant on the land in 1851, who inhabited a small house, and that the whole region of the Sacramento above Sutter's fort was not in a situation to be occupied, owing to the dangerous character of the Indians.

The board of commissioners rejected this claim; but, on appeal, their sentence was reversed by the district court, and the claim confirmed to the entire island, provided it did not contain more than eleven leagues. From this decree cross-appeals have been prosecuted to this court.

As an inducement to the allowance of his petition, the applicant refers to the services he had rendered to the governor in a military campaign; but the consideration of the grant is the proposed improvement of the department, by the settlement and occupation of its waste lands. The authority of the governor to make the grant is derived from the laws that provide for that object.

The decree of the governor indicates that the title was to be perfected in the usual manner; and, consequently, that it was to be subject to the conditions of colonization. An interval of eleven years elapsed from the date of this decree till the presentation of the claim to the board of commissioners in 1852. During this time, the applicant took no steps toward the completion of his title, or the fulfillment of the obligations it imposed. There is no expediente in the archives to show the segregation of this island from the public domain, nor report to the departmental assembly or the supreme government to testify that a citizen had been enlisted, "to give impulse to the progress of agriculture in the country." There was no delivery of judicial possession, nor any other assertion of right, by which the inhabitants could be charged with notice of this claim. A great change has taken place in the condition of the country; and other persons have assumed to settle and improve the land, which the applicant failed to do.

It is a general principle of equity, to grant a decree of specific

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performance only in cases where there is a mutuality of * obligation, and when the remedy is mutual, and that it [* 316] will not be rendered in favor of one who has been guilty of an unreasonable delay in fulfilling his part of the engagement, or who has slept for a lengthy period on his rights, and comes forward at last, when circumstances have changed in his favor, to enforce a stale demand. And it would be manifestly unjust to revive long antecedent covenants and dormant engagements in California, since the change in the condition and circumstances of that country, where it is evident that they were treated as abandoned, and imposing no obligation previously to that change.

The whole explanation for the laches of the applicant is found in the testimony of the witnesses Castro and Combs, who say: "The whole of the region of country of the Sacramento above Sutter's fort, or New Helvetia, was not in a situation to be settled upon by individual grantees, owing to the hostilities of the Indians;" "that the Indians were numerous and hostile."

But this fact existed at the date of the decree in 1841, and will account for the abandonment of the purpose, that the applicant seems to have entertained at one time, of making a settlement. It is hardly probable that he could have anticipated the revolution that took place long afterwards in the condition of the country, and was then preparing to avail himself of the advantage to be derived from it.

In the *United States v. Kingsbury*, 12 Pet. 476, the claimant sought to excuse the non-performance of the condition, because "the country was in a disturbed and dangerous state, from the date of the grant, and for a long time previous, till the transfer of the province." The court say: "All the witnesses concur in stating there was no more danger after the appellee petitioned for the land than there had been before and at the date of the application. The appellee, then, cannot be permitted to urge as an excuse in fact or in law, for not complying with his undertaking, a danger which applies as forcibly to repudiate the sincerity of his intention" to improve the land where he petitioned, as it does "his inability from such danger to execute it afterwards."

*The court say: "That concessions of land upon condi- [* 317] tion have been repeatedly confirmed by the court, and it will apply the principles of its adjudications to all cases of a like kind. It will, as it has done, liberally construe the performance of conditions precedent or subsequent in such grants. It has not nor will it apply, in the construction of such conditions in such cases, the rules of the common law. But this court cannot say a

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condition wholly unperformed, without strong proof of sufficient cause to prevent it, does not defeat all right of property in land, under such a decree as the appellee in this case makes the foundation of his claim."

In *De Vilemont v. United States*, 13 How. 261, the court say: "The only consideration on which such a title could be founded was inhabitation and cultivation, either by De Vilemont himself or his tenants; and having done nothing of the kind, he had no right to a title; nor can the excuse be heard, that he was prevented from a compliance with the conditions by the hostility of the Indians, as he took his concession subject to that risk."

In the cases of the *United States v. Fremont*, 17 How. 560, and *United States v. Reading*, 18 How. 1, the court have considered the effect of the conditions usually accompanying the grants to land in California, and how far their fulfillment is to be exacted in determining the validity of those claims. The court say, in the first case, "there is nothing in the language of the conditions, taking them altogether, nor in their evident object and policy, which would justify the court in declaring the lands forfeited to the government, where no other person sought to appropriate them, and their performance had not been unreasonably delayed."

In the latter case, it is shown that the grantee displayed good faith and reasonable diligence to perform the conditions annexed to his grant; and all presumptions of an abandonment of his claim were repelled by affirmative and satisfactory proof.

But, in the present instance, we find nothing to have been done to place the claim of the applicant upon the records of the [* 318] department; and the duty of a colonist was wholly * disregarded. Within the doctrine of the cases we have cited, the claim must be treated as one abandoned prior to the date of the treaty of Guadalupe Hidalgo, and is not entitled to confirmation.

Decree of the district court reversed; cause remanded; petition to be dismissed.

THE UNITED STATES, Appellants, v. JOSE ANTONIO ALVISO.

23 H. 318.

CALIFORNIA LAND GRANTS.

Where claimant showed a petition for the land, an order of the governor permitting him to occupy it while proceedings were in progress to perfect his title, a report that the land was subject to grant, and continued occupation for fourteen years, with cultivation and improvement, this court will not reverse the decrees of the commissioner and of the district court in his favor.

The United States v. Alviso.

APPEAL from the district court for the northern district of California. The facts are stated in the opinion. ,

Mr. Stanton, for the United States.

Mr. Robinson and *Mr. Leigh*, for appellee.

* Mr. Justice CAMPBELL delivered the opinion of the court. [* 319]

The appellee was confirmed in his claim to two square leagues of land in the county of Santa Cruz, and known as La Cañada de Verde y Arroyo de la Purissima, by the board of commissioners and the district court of California.

His testimony consists of a petition by his brother (Jose Maria Alviso) to the governor of California, in 1838, for a grant of the land, and permission to occupy it, while the proceedings for the perfection of his title were pending. This petition was granted, and the administrator of the ex-mission of San Francisco, de Assis, was directed to make a report upon the subject.

In 1839, this order was exhibited to the prefect of that district, who agreed to reserve the land for the claimant, and that the claimant might occupy it, referring him to the governor for a complete title. In 1840, the administrator reported that the land was unoccupied, and was not recognized as the property of the mission or of any private person. The claimant has a conveyance from his brother, the petitioner, dated in 1840.

The testimony shows that his occupation commenced in 1840, and has continued for fourteen years; that he has improved and cultivated the land, and that his family have resided on it.

The claimant appears to have been a citizen of the department, and no objection was made or is suggested why he should not have been a colonist of that portion of the public domain he has solicited. No imputation has been made against the integrity of his documentary evidence, and no suspicion exists unfavorable to the *bona fides* of his petition, or the continuity of his possession and claim. He has been recognized as the proprietor of this land since 1840. [* 320]

Under all the circumstances of the case, the court is not willing to disturb the decrees in his favor.

Decree of the district court affirmed.

The United States v. Pico.

WILLIAM B. SUTTON and others, Plaintiffs in Error, v. STACY B. BANCROFT and others.

23 H. 320.

PRACTICE IN SUPREME COURT—DAMAGES FOR DELAY.

Where parties are sued on a promissory note to which they have no defense, but set up a sham one, and bring the case here on writ of error, the court will on motion affirm with ten per cent. damages.

WRIT of error to the district court for the western district of Arkansas.

Mr. Watkins for defendant in error, stated the case and moved for damages.

No appearance for plaintiff in error.

[* 320] * Mr. Justice GRIER delivered the opinion of the court.

[* 321] * The plaintiffs in error were sued on a promissory note executed by them. They did not pretend to have any defense. They entered a false plea, which was overruled on demurrer. They refused to plead in bar. Judgment was entered against them in due form, for want of a plea.

They do not pretend to allege any error in the proceedings. The judgment is therefore affirmed with ten per cent. damages.

THE UNITED STATES, Appellants, v. FRANCISCO PICO and others.

23 H. 321.

CALIFORNIA LAND GRANTS.

A title produced from the private custody of claimant, dated July 20, 1846, thirteen days after the occupation of Monterey by the American forces, unaccompanied by satisfactory evidence of occupation, or assertion of claim prior to 1853, will not support the claim, and the decree of the district court in his favor is reversed.

APPEAL from the circuit court for the northern district of California. The facts of the case are stated in the opinion.

Mr. Stanton, for the United States.

Mr. Gillet, *Mr. Stanly*, and *Mr. King*, for appellees.

[* 324] * Mr. Justice CAMPBELL delivered the opinion of the court.

The appellee, a Mexican by birth, obtained a decree of confirmation in the district court for a parcel of land, known as

Las Calaveras, containing eight square leagues, and situated in Tuolumne county, in California.

His testimony is an expediente, existing in the archives, in the custody of the surveyor general, from which it appears that the claimant presented, to the justice of the peace and military commandant at New Helvetia, a petition, representing that he desired to obtain a grant for the land described in his diseño; and, to expedite his purpose, he requested a favorable report. One was made, bearing date the 1st of May, 1846. A similar representation was made to the same officer in the district of Yerba Buena, who declined to act because the place was not within his jurisdiction. The prefect of that *portion of the depart- [* 325] ment certifies, on the 18th of May, 1846, to the capacity of the claimant, and that the land was vacant. The governor, on the 11th of June, 1846, made an order for the issue of a titulo in form.

Here the expediente terminates; but the claimant produces from his custody a titulo, bearing date at Los Angeles, the 20th July, 1846.

To strengthen his case, he adduces the testimony of a witness, to the effect that the witness had built a house upon the land in 1847, and had occupied it as tenant from that date; that there were people who inhabited and cultivated the land for the claimant, and that before 1847 the disturbances in the country hindered any improvement or settlement.

This testimony is contradicted by a witness produced on the part of the United States, who testifies with precision, and seems to have had every opportunity of acquiring exact information. He says that he came to reside in the vicinity of the land in 1848, and that there had been no improvement or occupation of it, and that the cattle seen upon the land did not belong to the claimant; that he had never heard of a claim by the petitioner until 1853.

There are grave objections to the allowance of this claim. There is a departure from the regular and usual mode for securing lands under the colonization laws. There is some reason to believe that the governor was not at Los Angeles at the date of the order; and there is a failure to show, in any satisfactory manner, any assertion of claim or title under it, until the presentation of the claim, in 1853, to the board of commissioners. The claimant is a kinsman of the governor, and we should expect to find on the part of the governor the most exact attention to the laws prescribing rules for his guidance under such circumstances. Besides, the titulo bears date of a day when the conquest of Upper California had

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been completed by the military occupation of Monterey, Sonoma, Bodega, Yerba Buena, and the region of the Sacramento and American rivers, by the forces of the United States.

The commandant in that portion of the department was making a rapid retreat to Lower California, leaving the [* 326] *country to the control of the United States. From the capture of Monterey, on the 7th July, 1846, till the surrender of Los Angeles and the organization of a territorial government by Commodore Stockton, under the United States, there was scarcely six weeks. The California government, for all practical purposes, was subverted by the capture of Monterey and the country north of it.

In the act of congress of 1851, and the decisions of this court, that day is referred to as the epoch at which the power of the governor of California, under the authority of Mexico, to alienate the public domain, terminated. Previously to that date, the claimant did not acquire a title to the land, nor has he acquired an equitable claim to it by any act done upon the land in the fulfillment of the colonization policy of the State.

Upon the whole case, our opinion is, that the appellee has not sustained the validity of his claim, and that the decree in his favor must be reversed, and his petition dismissed.

THE UNITED STATES, Appellants, v. VICENTE P. GOMEZ.

23 H. 328.

CALIFORNIA LAND GRANTS—PRACTICE IN SUPREME COURT—SETTING ASIDE ORDER
DISMISSING APPEAL—FRAUD PRACTICED ON THE COURT.

1. This court, on motion of the attorney general, sets aside a former order of the court dismissing an appeal in this cause—because: 1. No order granting such appeal was ever made in the court below. 2. The filing the record in this court and motion to dismiss were frauds upon the court and upon the attorney general, and the transcript was false and fraudulent in setting out an order allowing the appeal.
2. The conduct of Ord and others in this matter examined, criticised, and condemned by the court.

APPEAL from the district court for the southern district of California. Motion to recall mandate and set aside former order dismissing appeal. The matter is fully stated in the opinion.

Mr. Black, attorney general, for the motion.

Mr. Johnson and *Mr. Gillet*, against it.

[* 330] *Mr. Justice WAYNE delivered the opinion of the court.

This cause was docketed and dismissed in this court upon the motion of the appellee, and a mandate sent to the district court from which the transcript of its record was obtained, for proceedings to be taken by that court to give to the complainant the benefit of its confirmation to the land in question.

* The attorney general now moves for the rescission of [* 331] the order of dismissal, and that the mandate may be recalled.

He does so, alleging that no appeal had been granted to the United States in the court below by which the cause could be brought to this court for its revision; because there was then pending in the court below, when the claimant obtained the transcript, a motion for the review of the decree which had been given confirming the claimant's title; secondly, that the court had also under its advisement a motion concerning an appeal.

And the attorney general further alleges, that the appeal from the decision of the board of land commissioners rejecting the petition, and also that the appeal from the district court to this court, are fraudulent.

The charges as to the first two rest upon the records which the appellee presented to this court, to have the cause docketed and dismissed.

The attorney general relies upon depositions and other papers which are on file in the district court for southern California, and which have been transmitted to this court by Judge Ogier, to establish the charge of a fraudulent combination between the then district attorney of the United States, Pacificus Ord, esquire, and the claimant of the land in controversy, and his assignees, to allow them to obtain from the district court a reversal of the land commissioners' decree rejecting the claim.

W. C. Sims, the clerk of the district court for the southern district of California, deposes that the document on file, giving notice that the claimant intended to prosecute an appeal from the decree of the board of land commissioners, is in the handwriting of Mr. Ord, with the exception of the figures No. 278 and the signature of E. O. Crosby.

The purpose for which this affidavit was made is, to show the interested connection between Mr. Ord and the claimant of the land, from the beginning of the institution of his suit to establish his right, and its influence upon the official conduct of Mr. Ord afterward, in every proceeding in the cause, after it had been removed from the northern district of California to the southern.

* Mr. Ord was originally the attorney of Gomez before [* 332]

the board of land commissioners, and filed his petition there as such on the 9th February, 1853. He was not then district attorney, but he became so on the 1st of July, 1854, before the land commissioners decided the case against his client. After his appointment, and after an order had been obtained, at his instance, to remove the cause from the northern district of California to the southern, of which he was the district attorney, and whilst the cause was pending in the latter, he took from Gomez, for the nominal consideration of one dollar, a transfer to himself for one-half of the land in controversy. This Mr. Ord admits in his affidavit presented to this court by counsel. The conveyance to him bears date on the 24th of November, 1856. It was acknowledged on the same day by Gomez before a notary public of the county of San Francisco, and was, at the request of Mr. Ord, recorded in the county of Merced on the 26th November, 1857; was also filed for record in the county of Fresno on March 26th, 1858, and again recorded by Mr. Ord in Monterey county the 3d May, 1858. A copy of that conveyance is now before us. These dates show that no record of the conveyance to him was made until after the claim had been confirmed by the district judge, upon his representation that, as district attorney, there was no objection to its confirmation; in other words, that he thought the claim a valid claim, and was within the rulings of the court in other claims of the same kind.

We shall cite the notice in its words, for, as it had been in fact the subject of the court's action, and could not have been so without the knowledge of Mr. Ord, and without his agency, it devolves upon him the task to disprove the declarations of Mr. Hartman of the forgery of the name of the law firm of Hartman & Sloan to the paper. We ought to remark, however, that Mr. Sloan, of the firm, is not shown by any paper to have had any personal agency in the matter. The notice is: "Now, on this day, came the parties, the appellant by Hartman & Sloan, and the appellee by P. Ord, United States district attorney: Whereupon, on motion of the attorney of the appellant, it is ordered that the trans-
[* 333] cript and papers * transmitted from the northern district court be filed in this court, and that the petition for a review of the same be entered thereon, and that the claimant have leave to proceed in said cause, the same as if it had been originally filed in this court." On the same day, a petition was filed for a confirmation of the claim.

After the confirmation of it in the manner as will hereafter be stated, Mr. Sloan, upon being told of the motion, and that it was

signed by the firm of Sloan & Hartman, but, in fact, as if the style of their firm was *Hartman & Sloan*, made his affidavit under a commission instituted by Judge Ogier, that neither as a member of the then firm of Sloan & Hartman, nor otherwise, was he ever retained or employed in the case; that he never wrote nor authorized to be written any *petition or other paper* in the case; that he never had seen such a petition; that he had never authorized any one to use his own name, or that of the firm of Sloan & Hartman, in the case; and that, if the paper was signed as it is represented to be, it had been without any consultation with him, or his consent or approbation.

The notice for a review of the decision of the board of land commissioners by the district court, signed, as has been said by E. O. Crosby, and wholly in the handwriting of Mr. Ord, was given after his connection as attorney for Gomez had ceased, and after he had become the half owner of the land. Mr. Crosby does not appear afterwards in the suit as the retained attorney of Gomez, nor does it appear in any other proceeding in the record of the case that he ever was so. It does not appear that Mr. Crosby was ever recognized by the land commissioners or by the district court as the attorney of Gomez, from which we infer, as the notice was in the handwriting of Mr. Ord, that Mr. Crosby was his agent for the purpose of obtaining a review of the case in the district court. Afterward, upon its being found out that the land in controversy was in the southern district of California, and not in the northern, a petition was filed for its removal to the southern district, which was granted.

At this point began those irregularities which, until * explained, must leave an unfavorable impression in [* 334] respect to Mr. Ord's discharge of his official obligations to the United States.

The motion made for the removal of the cause to the southern district is said to have been signed by E. W. F. Sloan, esquire, and presented by him in open court; and the order said to have been passed recognizes that as a fact. On the same day, the firm of Hartman & Sloan is reported in the transcript to have filed a notice of appeal with the clerk of the district court for the southern district. The paper has all of the formality and substance which such a paper should have, but Hartman & Sloan deny the fact of having had any agency in making such a motion; and these separate affidavits would be sufficient to sustain their disclaimer, were it not, so far as Hartman is concerned, that his subsequent conduct in the case shows a connection between himself and Mr. Ord, which

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throws suspicion upon both; and that is aggravated by Hartman's deposition, by that of other persons, *and by the narrative given by Mr. Ord of his conduct in the suit.*

Hartman then makes his affidavit, that he had no knowledge who made and caused the petition to be filed, nor by whose authority and direction the same was done. But he states that, whilst attending the June term of the southern district court in 1857, Mr. Ord, then United States district attorney, asked him if he would do him the favor to present a claim to the court for confirmation, stating it was a case in which there would be no opposition on the part of the government. That, not suspecting there would be anything wrong about a claim to which the government had no objection, he consented to do so; that, on the same day, the court being in session, and he being seated at the bar table, Mr. Ord passed to him the transcript in the case of Gomez and the United States, which he read to the court without any remarks, supposing it to be the case of which Mr. Ord had spoken to him; that after he had finished reading it, Mr. Ord remarked to the court that there was no opposition upon the part of the government to a confirmation;

whereupon the court replied, that there being no objection, [* 335] the claim would be confirmed, as a matter of course.

Mr. Hartman continues his narrative of his further connection with the case and with Mr. Ord, six months after, at the December term of the court, when it was held at Los Angeles. He says that then Mr. Ord remarked to him that it had been omitted, at the time of the confirmation of the claim, to have a decree signed by the judge; that Mr. Ord requested him to draw a decree, and to present it to the judge, to be signed *nunc pro tunc*. He says that he did so without knowing or suspecting that Mr. Ord had an interest in the land claimed by Gomez. This statement by Hartman of his agency in the confirmation of the claim, and in getting a decree upon it six months afterward at the instance of Mr. Ord, is denied by the latter in his affidavit, *excepting as to his declaration to the court that the government had no objection to the confirmation of the decree.* The latter he admits in stronger terms than have been given. We shall use the affidavit for other purposes, and will have it printed in connection with this opinion, in justice to Mr. Ord, that the relations between himself and Mr. Hartman may be properly estimated from their respective declarations concerning it, only remarking now that there is proof that Mr. Hartman had subsequently declared himself to have been the attorney of Gomez in the case; that he had been so in all that he had done in the case; and that he had charged and demanded a

fee for his services. It is not necessary for us to attempt to reconcile these differences, but it has certainly turned out unfortunately for Mr. Ord, in raising a violent presumption, from the manner in which they acted in the cause, that there was a concert between them to reverse the decision of the commissioners, and to obtain a decree in the district court for the claimant.

Besides the motion of the attorney general to vacate the order dismissing the cause, and to recall the mandate, a motion has been filed by the claimant for a *mandamus* to compel the judge of the district court to file the mandate, and to permit the execution of the decree confirming the claim. Another motion has also been made by the claimant for a *mandamus* to compel the judge to dismiss the proceedings before it upon the part of the United States, to open the decree, and to obtain * a new [* 336] trial. And there is also a third motion for a *mandamus* to compel the surveyor general to survey the land confirmed to Gomez.

We shall not go into the consideration of these motions, but will confine ourselves to that of the attorney general, using, however, such depositions as have been made under each of them, which correspond with and confirm the record presented to the court by the appellee, when he moved to have the cause docketed and dismissed.

Judge Ogier, in a return made to the first motion for a *mandamus*, certifies that the cause was tried by him upon the appeal from the land commissioners, and that he gave a judgment confirming the claim under the following circumstances :

Mr. Hartman presented the cause to the court, stating only its title and its number upon the docket, and Mr. Ord appeared for the government, and stated that there was no objection by the United States to its confirmation. As a matter of course, without inquiry or examination, that he directed a judgment of confirmation to be entered, but that no decree was given at that term of the court, nor was a motion made for one, or any motion for an appeal by the United States to the supreme court. At a subsequent term of the court, E. J. McKewen, representing Mr. Ord, made a motion for an appeal in this cause and in several others ; that, being then in doubt if an appeal could be given after the expiration of the term of the court at which judgment was rendered, he took the subject under an advisement, and that then Mr. McKewen suggested that the same point was under consideration in another case before the supreme court, which determined him to reserve his decision until that point was ruled here ; then that Mr. Hartman offered a judgment of confirmation, Mr. Ord assenting thereto, on behalf of the United States, and it was ordered.

The case remained in this condition, the right of the United States to an appeal being reserved until the 7th day of December, 1838, when Mr. Gitchell, having succeeded Mr. Ord as district attorney, filed a motion for leave to withdraw Mr. McKewen's motion for leave to appeal, and also filed another motion for [* 337] a rehearing of the cause, substituting the last for a * motion which had been made by Mr. Stanton, then in San Francisco, and also representing the United States as its specially retained attorney. A day was then fixed, with the consent of all the parties, for hearing the pending motion. When the day arrived, Mr. Gitchell made a motion for a continuance, with an affidavit setting forth that the decree which had been given for the confirmation of the claim had been fraudulently obtained from the court, Mr. Ord having become the owner of half the land in controversy by a conveyance from the claimant, and that he had conspired with Gomez, or his assignees, to permit the judgment to be given for Gomez without a contest on the part of the United States. A copy of the conveyance from Gomez was filed with the consent of the claimant.

Mr. Gitchell's motion for a continuance was refused, on the ground that the proper motion under his charges was to ask for leave to file a bill of review. But Judge Ogier, feeling and thinking that he had improvidently given a judgment of confirmation, did continue the hearing of the motions to obtain proofs, if any could be had, concerning the contrivance by which he had been imposed upon. A commission was issued by him for that purpose, and under it Mr. Sloan made the affidavit denying all connection and attorneyship for Gomez, as has already been recited in this opinion. The case then remained in the district court as it was when the motions which were made, without any further action upon that for an appeal.

This narrative has been given from documents, depositions, and declarations of the parties concerned in the case, and also by other persons, apparently disinterested, in respect to the land. They will be found either on the record upon which the cause was docketed and dismissed in this court, or in the book of exhibits sent to this court by Judge Ogier, which were obtained to enable him to act understandingly upon the merits of the case. The case *being still before the court*, we do not perceive any irregularity in the proceedings. Besides the motion for granting the appeal, the court had jurisdiction of the cause to determine what proceedings the [* 338] claimant was entitled to * under the circumstances of the case, to get the benefit of the decree, by survey or otherwise.

We will now proceed to show, from the record of the case filed in this court by the claimant, and from the official declarations of the clerk of the district court from whom the record was obtained, that this court had no jurisdiction in the case when it was docketed and dismissed.

Mr. Sims, the clerk of the court, deposes, that in this case, a transcript was called for by letter, signed W. W. McGarrahan; that, when that letter was received, no appeal had been allowed to carry the cause to the supreme court, and that a motion for that purpose was still under the advisement of the court. The deputy clerk, Mr. Coleman, however, sent to McGarrahan a transcript, which was received by McGarrahan; and, that not being satisfactory, it was returned to the clerk, with a letter from McGarrahan, stating in what particulars it was deficient; and among them, that it was deficient in *not having a copy of the order for an appeal to the supreme court*, which McGarrahan suggested would be found on the minutes of the court. To this letter a reply was given by Mr. Stetson, who had succeeded Mr. Coleman as deputy, containing an order for an appeal, as it appears on the transcript before us. It is difficult to determine how such an order found its way into the second transcript of the record, when it was not in the first, and when the clerk deposes that no such order had ever been given. The order for an appeal may have been drawn in anticipation of the action of the court upon the pending motions, and left in the clerk's office unintentionally, and supposed by the deputy clerk to have been passed by the court, or it may have been drawn by Mr. Ord and left in the office, to keep up the semblance of his having faithfully represented the United States in the case, or it may be that some one of the parties interested in the land had surreptitiously placed it in the transcript to accomplish the purpose of having the case docketed and dismissed in this court. Dates will, in some measure, throw light upon the matter. It was written and dated on the same day that the court took under its advisement the motion relating to the appeal. Such antagonism in * the action of the court upon the same subject-matter of [* 339] such importance as this was, would, indeed, be extraordinary; and the record shows that it does not exist.

It is a delicate and most unwelcome task which we are performing; but it must be done, in order that violated justice may be vindicated, and that official purity of conduct in our courts may be preserved and be unsuspected.

The record upon which this case was docketed and dismissed, in

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connection with the book of exhibits sent to this court by Judge Ogier, establish, in our view, the following facts:

That Mr. Ord became the purchaser of half the land in controversy from Gomez, the claimant, when he was the district attorney of the United States; that whilst he was district attorney, he prepared in his own hand the paper, signed by S. O. Crosby, for the removal of the cause from the board of land commissioners to the district court; that Mr. Ord did not officially, as district attorney, represent the United States in the case in the district court, in any one particular, but allowed it to be done by others, who were interested in establishing the claim of Gomez, to whom he gave his official confidence, and who are shown by the record not to have been the retained attorney of Gomez; that he permitted a judgment to be taken against the United States without argument, or the production of proof to establish the validity of the claimant's right to the land, by saying to the court, in his official character, that the United States had no objection to the confirmation of the claim. And it is established by the record itself that no appeal has been given to the United States by the court below. Mr. Ord admits that he relies upon the declaration only of the person to whom he confided the order which he drew for an appeal, that it had been granted by the court.

Under such circumstances, we conclude that no appeal had been granted; that the cause was not before us when the appellee made his motion to docket and dismiss it.

A motion to docket and dismiss a cause from the failure of the appellant to file the record within the time required by [* 340] the *rule of this court, when granted, is not an affirmation of the judgment of the court below. It remits the case to the court to have proceedings to carry that judgment into effect, if in the condition of the case there is nothing to prevent it. That is for the consideration of the judge in the court below, with which this court has nothing to do, unless his denial of such a motion gives to the party concerned a right to the writ of *mandamus*. The case is before us also upon such a motion, but we do not consider it upon the ground that this court had no jurisdiction of the case when it was docketed and dismissed, and that the appellee had no right to make that motion, under the rule of this court. All that we shall now do will be to correct an irregularity in the order given by this court in a case in which we believe it had no jurisdiction, and because the circumstances of it disclose that the judgment in the court below had been obtained by contrivance, and with the consent of the district attorney, in violation of his obli-

gations to the United States, from which he necessarily anticipated a benefit, being then owner of half the land in controversy.

In vacating the order for the dismissal of the case, and for recalling the mandate, we do no more than to correct a proceeding improvidently allowed by the court, under a misrepresentation to it of the actual condition of the cause in the court below. Orders of the same kind for misrepresentation have often been made and allowed. We cite two cases from the English reports. In *Stewart and E. Drew*, petitioners, and *P. J. Agnew*, in *Shaw's Reports*, it was held to be incompetent to repeal a case on the merits formerly argued, and on which judgment had been pronounced by the House of Lords, but that the judgment might be amended on a point in which no decision had been given by the court of session, and on which no argument had been had, through misrepresentation stated in the House of Lords by the party against whom the judgment was pronounced. (1 *Shaw*, 413.)

In *Ex parte James White, Courtenay et al.*, 4 House of Lords Cases, 313, it was ruled upon petition that a judgment of the house given on appeal cannot be reversed; but when such appeal and judgment have been obtained by suppression *and [* 341] misrepresentation, the house will afterwards discharge the order granting leave to appeal, and the order constituting the judgment thereon.

Much was said in the argument of this motion concerning declarations, and a correspondence of the attorney general in relation to an appeal having been taken in the court below for the United States. It matters not what they were, or how the attorney treated the matter, if he was deceived as to the actual fact of an appeal having been allowed. If it turns out to be that it had not been, any admission to the contrary cannot affect the United States.

Since the case was argued, the counsel for the claimant, with the consent of the attorney general, has placed before us an affidavit made by Mr. Ord, in explanation of his conduct in the trial of the cause in the district court, embracing his connection with Gomez, and his purchase from him of half of the land in controversy. We believe it to be proper to give him the benefit of his own narrative, and therefore shall direct his affidavit to be printed in the forthcoming volume of the reports of this term of the court with this opinion.

We direct that the order for docketing and dismissing this cause shall be vacated, and that the mandate which followed it shall be recalled.

The motion of the attorney general for such purpose is granted.

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THE UNITED STATES, Appellants, v. JAMES R. BOLTON.

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CALIFORNIA LAND GRANTS.

1. The claimant shows no archive evidence of his grant, and does not show that any ever existed. The Mexican government relied on its records, and not on the paper given to a claimant, as the evidence of its acts, and so does this court.
2. All the circumstances, the evidence being thoroughly examined in the opinion, go to prove that the claim is a fraud; and the decree establishing it is reversed.

APPEAL from the district court for the northern district of California. The facts are fully stated in the opinion.

Mr. Black, attorney general, and *Mr. Reed*, for the United States.

Mr. J. Mason Campbell and *Mr. Walker*, for appellee.

[* 343] * Mr. Justice CATRON delivered the opinion of the court.

In March, 1852, the appellee presented his claim to the commissioners for settling land claims in California for a parcel of land situated in the county of San Francisco, and bounded north by what was formerly known as Yerba Buena; northwest by lands of the presidio of San Francisco; west by the lands of Francisco Haro; south by the lands of Sanchez; and east by the bay of San Francisco, with a reservation of the curate's house, the church of Dolores, and other previously granted lands within the external boundaries of the tract, which include 29,717 acres; and the claims previously granted within those boundaries are 19,531 acres; leaving, as the unquestioned claim of Bolton, 10,186 acres. The original claimant is Jose Prudencia Santillan, a secular priest, who, together with his general agent, Manuel Antonio Rodriguez de Poli, in April, 1850, upon the recited consideration of two hundred thousand dollars, conveyed it to Bolton, the appellee. An interested party testifies that, in 1851 and in 1854, it was worth, at a low estimate, more than two millions of dollars. The claim was confirmed in 1855 by the board of land commissioners, and in 1857 their decree was affirmed in the district court. The grant to Santillan bears date the 10th February, 1846. It purports to have been made by Pio Pico, "first member of the assembly of the department of the Californias, and charged with the administration of the law in the same," and to be signed by Covarrubias, as secretary. It recites that the priest Santillan has petitioned for a grant, for his own benefit, of all the common lands known as belonging to the mission of Dolores, as well as the houses of

[* 344] the rancherias of the * mission, which were in a state of

abandonment; and that thereupon the governor had proceeded to grant them, subject to conditions:

1. He shall pay, as a compensation for said grant, all the debts that exist against the mission.

2. He shall petition the proper judge for the judicial possession, in virtue of the grant, of all the lands and houses conveyed; and in the meantime, the possession which he has of the houses and lands, in his capacity of administrator, appointed as such by the prelate of the missions of the college of Our Lady of Guadalupe, in Zacatecas, for the temporalities of the mission of Dolores, shall serve as legal.

3. The judge who shall give the possession shall have it measured and marked with the customary landmarks, the contents being three square leagues, more or less.

4 and 5. That the houses of the curate, and the church of Dolores, and the property which some persons hold under good titles, shall be respected, and that the title be recorded.

The claimant exhibits a letter from Covarrubias to Santillan, dated 15th January, 1846, which informs him of an order made by the governor to the administrator of the mission to make formal delivery of all the appurtenances of the mission Dolores to Santillan, that he (Santillan) may administer the temporalities of the mission.

In March, 1850, Santillan published a notice in a newspaper in San Francisco, which stated that the Governor, Pio Pico, on the 10th February, 1846, had granted to him all the uncultivated lands and all the unoccupied houses appertaining to the mission; that the grant was made and is recorded in the city of Los Angeles, and that it was written by Covarrubias, then secretary of the governor; that in the month of January, 1846, an order had issued to the administrator of the mission, to put Jose Prudencia Santillan in possession of the temporalities of the mission, which was done; and that the grant, being made one month after, recognizes and refers to this order of the government, and provides that the possession under the order was for the purposes of the grant. This notice was designed to warn persons from trespassing on the land, * or purchasing titles from the justices of the [* 345] peace, acting in the capacity of alcalde in San Francisco.

The grant itself was recorded shortly after in the county records of San Francisco; and in May, 1852, the claim was filed, with a petition demanding its confirmation, before the board of land commissioners, sitting at San Francisco.

In its support, four principal witnesses were relied on, namely:

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Jose Maria Covarrubias, Cayetano Arenas, Jose Matias Moreno, and Narcisco Botello. Covarrubias's deposition was filed with the petition. He was secretary of the government when the grant bears date, and deposes that he wrote the document; that Governor Pio Pico signed it, and that he, Covarrubias, countersigned it as secretary; all of which was done in the secretary's office at Los Angeles, at the time the grant bears date. He says the paper there exhibited was one of those delivered to the party, and that he believes it is a substantial copy, if not a literal one, of an order of the governor for the purposes therein stated.

Arenas states that he was employed as an officer in the office of the secretary of the government; that he saw the grant now filed before the board of land commissioners, produced at the office of the secretary of the government in the month of February, 1846, about the time it bears date. "It is a document given out by the government to Padre Santillan." He declares the signature of the governor and secretary to be genuine; that he saw the document made; also, that had the grant remained in the secretary's office, it is probable he should have seen it. Being asked whether a note of the grant was ever made in any book of titles, he answers that there were then only loose sheets of paper kept on which to note titles at Los Angeles, the regular book being at Monterey; and that a note of this title was made on said loose sheets of paper. "I wrote the note of this title myself." The sheets of paper were stitched together.

Moreno proves that he was appointed government secretary as successor of Covarrubias, and came into office on the 1st day of May, 1846, and continued to act as secretary until the country [* 346] was conquered in July following. He is asked on *behalf of the claimant, "Whilst acting as secretary, did you ever see a paper purporting to be a petition of Jose Prudencia Santillan for a grant of land of the ex-mission of Dolores, or any other paper in relation to said grant?" and answers, "I never did."

He further states, that he had never seen any such grant, or any papers relating thereto. "All I recollect is, that I saw the name of Padre Santillan in the book in which the note of titles was taken; it was on the last page, but I do not know whether it was in relation to a grant or not. The book contained nothing but the notes which were taken of titles.

Narcisco Botello deposes, that he was a deputy of the departmental assembly during the first four months of 1846, and served as one of the committee on public lands, and during that time the original *expediente* and grant made to Santillan, of the mission of

Dolores and its lands, came up for action before the assembly; that the title was duly submitted and approved. He swears to its confirmation in the most precise terms. To meet this evidence, it is suggested for the United States that the assembly never acted on sales of land made by the governor of mission property; and this may be true; but the grant to Santillan was not a sale of the mission of Dolores. It is in form an ordinary colonization grant, made according to the act of 1824 and the regulations of 1828, and under their authority; nor can the recital in it—that Santillan shall pay the debts of the mission—affect the title. The title is vested, whether the debts were or were not paid. The petition and grant were undoubtedly proper papers to be submitted to the assembly for approval.

Under the acts of colonization, the records of the departmental assembly in 1846, during the time that Botello says he acted on the committee of public lands, are well preserved. The different meetings and daily proceedings of that body are minuted in regular form in the journals. From these it appears that its first session for 1846 commenced on the 2d day of March, and on that day Norega and Arguillo were appointed the committee on public lands; and in the session of the 4th of March, Senor Botello obtained a leave of absence * for a term not exceeding three months. His absence is usually noted at the end of each day's proceedings, and his name does not again appear as an acting member until the 15th of June. On the first of July he was elected temporary secretary of the assembly, in the absence of Olvera, the regularly-appointed secretary. Botello certainly did not belong to the committee of public lands during the year 1846.

The first report of the governor to the assembly respecting the disposal of lands was of forty-five grants to sundry individuals, and was made the 8th day of May, and referred to the committee. The committee reported favorably, and the grants were confirmed in the session of June 3d. The decree of confirmation includes grants down to May 3d, 1846. That of Santillan is not among them.

The decrees of confirmation are distinct, regular, and definitive, and there is no reason to suppose that any grant that had been made was reversed from the assembly. And, in addition, Moreno proves that, whilst he acted as secretary to Governor Pico, he never sent to the departmental assembly any expediente or grant of lands to Santillan. And as it was his official duty to do so, he can hardly be mistaken. We deem it true beyond controversy that Botello was not one of the committee on vacant lands; that the

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claim of Santillan was not presented to the departmental assembly; and that the statement of Botello, in his deposition of his official relation to this grant, is without any foundation in truth.

Covarrubias having stated that Padre Santillan filed a petition for a grant of the mission lands of Dolores, and that Governor Pico made an order on which the grant was founded, it becomes necessary to inquire whether such petition and order ever existed in the archives; and secondly, the probability of their being lost, as not the slightest evidence now exists in the archives of any petition, order, or the record of a grant.

Moreno states that he took possession of all the archives, when he came into office as successor of Covarrubias. Arenas says this was the next day after Covarrubias had resigned, in February, 1846.

Moreno states that it was on the 1st day of May, 1846. It [*348] is certain that Moreno submitted to the *assembly the titles confirmed in June. He proves that no such papers were ever seen by him; and as he was examined on behalf of the claimant to prove the authenticity of this grant, and whatever might conduce to that end; and as he was interrogated relative to the existence of papers properly connected with it, if authentic, and remaining in the public repository under his official care; and as he denies knowledge of the deposit or existence of such papers, his testimony raises a strong presumption that the requirements of the colonization laws were not complied with on this subject. We are confirmed in this opinion by the examination of other testimony.

Arenas says he took the name of the title and the number and date of the grant; that is to say, of the grant then before him, and then delivered to Santillan. But he says nothing of the petition nor decree conceding the land. All that Covarrubias states is, that there was a petition and decree of the governor, on which papers the grant was founded. But he does not swear that they were filed or recorded.

As respects the probability of a loss of Santillan's title papers, Moreno proves that when the United States forces suppressed the Mexican government of California, in August, 1846, by order of Governor Pico, he deposited the archives belonging to the secretary's office in boxes, and placed them in the house of Don Louis Vignes, in Los Angeles; and he knows nothing further of them. And Olvera proves that he made a similar deposit of the records of the departmental assembly at the house of Don Louis Vignes. This occurred about the 10th of August, 1846. He says that he then had expedientes in his charge as secretary of the assembly.

How many does not appear. Up to this time, it is not assumed that any documents were lost.

Commodore Stockton directed the removal of these archives, and for that purpose they were taken possession of by Colonel Fremont; and after some delay and some exposure, they were eventually delivered to Captain Halleck, of the United States army, at Monterey, then acting secretary of state under the military governor of California. Captain Halleck proves that, *when de- [* 349] livered to him, they were in a bad condition, being much torn and mutilated. They were shortly after arranged, numbered, and labeled.

It is a historical fact, that the expedientes and grants made for some ten years before the year 1846 are referred to in an index, and in a register known as the *Toma de Razon*—the former made by Manuel Jimeno, who was the government secretary before Covarrubias. And as the title papers to which reference is made in this index, and the register, are found in the archives as they now exist, it is reasonable to suppose that those expedientes made in 1846 were carried with equal safety, as they came into Colonel Fremont's hands, according to the testimony of Moreno and Olvera, in the same condition; and, according to the testimony of others, they were transported in the same manner, and were continued in the same custody; and it is true, that the expedientes of 1846 are apparently as well preserved as the others; but from the loss of the *Toma de Razon*, and the absence of a contemporary catalogue like Jimeno's index, we have not the same assurance of their entire existence.

Be this as it may, the claimant was bound to prove that records showing a substantial compliance with the laws of colonization did exist when the copy he produces was given to Santillan before he could be heard to prove their loss and their contents.

In deciding on this controversy, we are to be governed by the laws and usages of the Mexican government administered in the department of the Californias (as respects the granting of lands) before the conquest of the country, and according to the principles of equity. These are the rules prescribed by the act of March 3, 1851, sec. 11.

The laws and usages applicable to this claim are found in the regulations of 1828.

Lands were to be granted "for the purpose of cultivating or of inhabiting them;" and the mode of obtaining a grant is prescribed to be by an address to the governor, setting forth the petitioner's name, profession, &c., describing distinctly, by means of

[* 350] the lands he asks for. Then the governor * was to obtain the necessary information whether the petition embraced the legal conditions, both as regards the land and the applicant. This being done, the governor was required to proceed to make an order for the formal grant to be drawn out, which he should execute.

Sec 11 directs that a proper record shall be kept of all the petitions presented and grants made, with maps of the lands granted.

This record is the evidence of grant. It being made, the governor (sec. 8) shall sign a document, and give it to the party interested, to serve as a title, wherein it must be stated that said grant (to wit, *the record*) is made in exact conformity with the provisions of the laws. In virtue of this document issued to the party, possession of the lands shall be given. But the document is not sufficient of itself to prove that the governor has officially parted with a portion of the public domain, and vested the land in an individual owner. This must be established before the board of commissioners by record evidence, as found in the archives, or which had been there, and has been lost. The titulo given to the party is merely a certificate by the governor of the acts that have been done in the regular course of official procedure towards the disposal of a part of the public domain. Among individuals, this certificate serves the purpose of evidence. But when the government institutes inquiries in reference to the subject, it is entitled to require the production of that official record, which it has prescribed to its officer, for its own security, and as a necessary condition of a legal administration, and a necessary precaution against fraud. That a petition was presented by Santillan is stated incidentally, but indistinctly, by a single witness, (Covarrubias;) and this unsatisfactory statement is disproved by the absence of the record and the evidence of his successor, Moreno. The claim, as presented to the board of commissioners and the district court, has no legal foundation to rest upon.

The degree of record evidence which is required to support a claim of the above description is considered and adjudged in the case of Cambuston, (20 How. 59,) and more at large [* 351] * in the decision made at this term in the case of Fuentes against the United States; so that a further consideration on that head is not required in this case.

Such being the *legal* condition of this claim, the next question is, how does it stand on its *equities*?

The grantee is one of the eighteen secular priests who were in California. He arrived at the mission of Dolores either in 1844 or

1845, probably in the latter year. He was of Indian extraction, and in necessitous and distressed circumstances. A number of witnesses say he subsisted on alms. A grant to a priest for his own benefit is a singular fact in California. The bishop elect since 1850 says: "I learned that Padre Santillan obtained a grant of land from Governor Pio Pico. I know of no other instance excepting this, and have heard of no other case in which the grant has been made to a priest personally, and for his own benefit." Berreyesa, when pressed for the reason for the retention of a casual conversation in his memory for so long a period, says: "It was an unusual thing for a mission to be granted to a padre, for it was thought that the padres could not hold such property, and it seemed strange to me."

But the grant was made to this necessitous padre upon the primary condition that, "in consideration of this grant, he shall pay the debts of the mission which exist up to this time." It would seem that a grant of land with such a condition, to such a person, was a vain thing. There is no testimony to show what the amount of the debt assumed by Santillan was, to whom it was owing, when and how it was contracted, or what security was required for its payment. Neither Pio Pico nor Covarrubias afford the slightest information of the manner in which the consideration was to be paid:

Until the spring of 1850, none of the large community then building up a city on the land in dispute had any suspicion that this poor man claimed to be owner in his own right of ten thousand acres of land, with an outer boundary including three other grants, and embracing nearly thirty thousand acres.

He had made some claim for the church as a priest and *administrator of the mission, and had caused the papers [* 352] of the mission to be examined by a competent lawyer, and endeavored to repel intruders at his door by some title which he supposed might exist among the documents of what had been an important missionary establishment. No title was found which vested this property in the church, and superseded the public title; and then this claim was first made known to the public.

There were at that time a thousand settlers on the land claimed, holding their possession and titles by purchases made from a justice of the peace, appointed under the authority of the military government of the United States in California, and who professed to make grants not exceeding fifty varas square, but with a reservation of the claims of individuals and that of the United States. Of course, these claimants expected to receive an acknowledgment, or some

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recognition, of their title by the United States. The Padre Santillan seems to have been much excited by his contest with these occupants. In September, 1849, he constituted O'Connor, an attorney at law, and Salmon, a merchant, his attorneys, and authorized them to enter into possession, for the uses and benefits of the mission of Dolores, and of which he was pastor, of lands, tenements, and hereditaments, that he had a right to enter into, possess, and enjoy, and the same dispose of by lease, for the benefits and objects of the mission, with all the powers that he possessed by virtue of his pastoral care and tutorship, in his own right and the rights of others represented by him. "He also empowered them to ask, demand, recover, and secure, the sum or sums of money now due or owing for occupancy and use of the lands, houses, tenements, and hereditaments, belonging to the parties represented by him, or belonging to him, by virtue of his office."

The attorney mentioned in this deed is a leading witness to discredit the genuineness of the grant.

He had no notice or imagination of its existence when this power was accepted. In November, 1849, the Padre Santillan, with Dr. Poli, made a journey to Santa Barbara, the place of residence of Covarrubias, and on his return intimated to his [*353] * friends "that he had been to the governor, and that the Americans could not rob the church any longer;" that he had the paper, "in which were all his hopes;" "that he was well off;" and used other exultant expressions, which denote that the acquisition of the deed was newly made, and that a great change was effected by it in his condition and feelings. In the month of March, 1850, he announced to the public of San Francisco that such a grant was in his possession, with other circumstances before detailed, and in the month of April conveyed the land to the claimant.

The testimony does not disclose what was the depository of this grant in Santa Barbara, nor when nor under what circumstances it was placed there, nor under what circumstances withdrawn. Neither Santillan nor Dr. Poli have been examined as witnesses; nor was Pio Pico interrogated in reference to the authenticity of the grant.

There is no proof to show that any of the conditions of the grant have been fulfilled. The testimony as to the payment of any portion of the mission debts is vague and unsatisfactory. There was no judicial possession sought or obtained, and no claim made for the land as the grantee thereof, to give the community at large any information concerning it.

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Our opinion consequently is, that the validity of the grant has not been sustained, and that the decrees of the board of commissioners and the district courts are erroneous and must be reversed, and that the cause be remanded to the district court, with directions to dismiss the claim.

EDWIN G. ADAMS, Plaintiff in Error, v. SAMUEL NORRIS.

23 H. 353.

WILLS—EVIDENCE WITHOUT PROBATE IN CALIFORNIA.

The testator made his will in 1845, and it was witnessed by Spear and Hinckley and Ridley, the sindico. The testator died in 1848, Spear in 1846, Hinckley in 1847, and Ridley in 1852. The defendant, Norris, was in possession of the land devised by the will from the death of testator, and the question turned on the validity of the will. Held,

1. That the binding force and legal operation of the will were to be governed by the law as it existed when the codicil was made; and the mode in which it should be submitted to the court and jury, and the effect to be given to the testimony that accompanied it, depend upon the law of the forum at the time of the trial.
2. Such a will is not inadmissible under the laws of California, because it had not previously been admitted to probate, and because the witnesses had not been examined to establish it as an authentic act.
3. Nor is it void because it does not appear on the face of the will that the witnesses were present during the whole time of its execution, and heard and understood its contents.
4. Nor was it error to leave it to the jury, on the evidence, to decide if there was a custom in California of general prevalence of ten years' standing, having the tacit assent of the authorities previous to the annexation to the United States, as to the manner of making wills, so prevailing and notorious as to presume their assent, operating as a modification or repeal of prior laws.

THIS is a writ of error to the circuit court for the district of California. The facts are well stated in the opinion.

Mr. Benjamin and Mr. Cushing, for plaintiff in error.

Mr. Johnson and Mr. Stanton, for the defendant.

* Mr. Justice CAMPBELL delivered the opinion of the court. [* 356]

The plaintiff claimed, as the assignee of heirs at law of Eliab Grimes, deceased, the title and possession of an undivided seven-eighths of a parcel of land in Sacramento county, known as the rancho del Paso, containing ten square leagues, being the land granted to Eliab Grimes by Micheltorena, governor of California, the 20th December, 1844. The defendant resisted the claim, as the assignee of Hiram Grimes, who is a devisee of the land by a codicil to the last will of Eliab Grimes, which is in the Spanish language, and of which the following is a translation:

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“SEAL FIRST—EIGHT DOLLARS.

“Provisionally empowered by the maritime custom-house of the port of Monterey, in the department of the Californias, for years eighteen hundred and forty-four and eighteen hundred and forty-five.

PABLO DE LA GUERRA.

“MICHELTORENA.

[SEAL.]

“I, Eliab Grimes, a Mexican citizen by naturalization, having to add a codicil to my testament heretofore made, and desirous of doing it in conformity with law established in this republic, do make and declare it to be of my will and intention, in presence of the alcalde of this jurisdiction, his secretary, and two witnesses of assistance, as follows:

“Codicil 2d. I give and bestow to Hiram Grimes, my nephew, all the right and title which the government conceded [* 357] *to me to the rancho known (or named) as the ‘rancho del Paso,’ in Upper California, situated on the American river, as is delineated and appears in the plan and title, the original of which exists in the public archives of Monterey, together with all the cattle, horses, and other animals, that are on said rancho, as also all the buildings and laboring and cooking utensils, and all other property of mine which is met with on said rancho, deducting always a certain proportion of all the cattle, horses, and other animals, and of their produce, for those who have had the care of said rancho, in payment of their services, according to the agreement made.

“And in order that it may be evident, I sign in the manner above expressed this 18th day of April, 1845, at the pueblo of San Francisco de Asis, and at the same time there remains deposited a copy in the archives of the same.

“ELIAB GRIMES.

“Before me, in the absence of the two alcaldes.

“ROBERTO T. RIDLEY, *Sindico*.

“Witnesses:

“NATHAN SPEAR.

“GUILLERMO HINCKLEY.”

The verdict and judgment in the circuit court were in favor of the defendant; and the cause is presented to this court upon exceptions to decisions of the presiding judge in the course of the trial.

The defendant, to sustain the codicil, established, by the admission of the plaintiff, the genuineness of the signatures of the testator and of the witnesses to the codicil, and that they were all dead, the

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testator having died in 1848. He also adduced the testimony of a number of witnesses to prove the existence of a custom in California as to the mode of making wills prior to any change in the Mexican law by the State government, and that Grimes, shortly before his death, had informed a witness that he had devised his place of del Paso, with the stock on it, to Hiram Grimes, his nephew, and desired of him some aid for his nephew in the settlement of his affairs. No other testimony is reported in the bill of exceptions. It was contended, on behalf of the plaintiff, that the * codicil [* 358] was not competent as evidence, nor sufficient to transfer property:

1. That the codicil had never been admitted to probate in California, and that the proof of the signatures to the codicil was not sufficient to establish its validity.

2. That there is no statement in the paper itself tending to show that the disposition was dictated by the testator in presence of the witnesses, or read over to the witnesses in the presence and hearing of the testator, they being present at one and the same time, without interruption or turning aside to any other act, and having been so dictated, or so read over, was declared by the testator to the witnesses to be his last will and testament.

3. That three witnesses of assistance are necessary to the validity of a will, and that the *sindico*, not having professed to act as a witness, and being without authority to receive wills in that capacity, the codicil is void for want of the sufficient number of witnesses, and that this deficiency could not be cured by proof of any custom at variance with the written law.

The court did not support these objections, but instructed the jury that a will, executed under the Mexican laws, in presence of only two witnesses, affords no sufficient proof of the execution. But if they should be satisfied, from the proofs in this case, that a uniform and notorious custom existed uninterruptedly for the space of ten years in California, which authorized the execution of wills in the presence of two witnesses only, and which custom was so prevailing and notorious that the tacit assent to it of the authorities may be presumed, then the proof of such a custom, and for such a length of time, will operate a repeal of the prior law, and that two witnesses will be sufficient. On the contrary, if a custom of the character described and for the period mentioned was not proved to their satisfaction in such case, if three witnesses have not attested to the codicil, it is a nullity.

The court further instructed the jury, that if, from the evidence and under the instructions given, they should find th

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nesses required, they will inquire whether each and all of
 [* 359] * the three witnesses to the will is or are competent ; that
 the will being written in the Spanish language, if either
 of the witnesses did not speak or read that language, and could
 not understand the disposition of the property made by it, and that
 the testator was in the same predicament, such witness would be
 incompetent, and, unless the custom was established, the codicil
 would be null ; but if the custom was established, that custom
 would control the case ; and if the signatures of the testator and
 of a sufficient number of witnesses is established, in the absence of
 countervailing testimony, the jury may infer a due execution of the
 will. This selection from some twenty exceptions will sufficiently
 present the questions that were considered in the circuit court, and
 have been discussed at the bar of this court.

These instructions require an examination of the law of California, previously to its organization as a State, relative to the execution of a testament, and a modification of that law by the revolution made in its legal system after that event. The law of Spain was introduced into Mexico, and forms the basis of its jurisprudence. By the laws of the council of the Indies, it was provided in all cases, transactions, and suits, which are not decided nor provided by the laws contained in that compilation, nor by the regulations, provisions, or ordinances, enacted and unrepealed concerning the Indies, and by those which may be promulgated by royal orders, the laws of the kingdom of Castile shall be observed conformably to the law of Toro, with respect as well to the substance, determination, and decision of causes, transactions, suits, as to the form of proceeding. The Partidas (6 part, tit. 1, l. 1, 2) describes two kinds of wills. "The one is that which is called, in Latin, *testamentum nuncupativum*, which means a declaration openly made before seven witnesses, by which the testator makes known by words or in writing who the persons are whom he institutes as his heirs, and the manner in which he disposes of his other property." This form of will is of Roman origin, and can be traced to the modes of testamentary disposition employed in the time of the republic. Originally the form was wholly
 [* 360] nuncupative, but the use of writing * was allowable before the *testamentum in scriptis* was introduced.

The Partidas proceeds to describe the other form of will—"that which is called, in Latin, *testamentum in scriptis*, which means a declaration made in writing, and in no other way. This will ought to be made before seven witnesses, called at the instance of the testator for that purpose. Each of the witnesses ought to

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write his name at the end of the will ; and if one of them should not know how to write, either of the others may do it for him, at his request. We also say that the testator ought to write his name at the end of the will ; and if he should not know, or could not write, then another may do it for him, at his request."

The witnesses were formerly required to superscribe and seal as well as sign the will. If the testator desired to conceal the contents of his will from witnesses, he could do so, either by writing the will, or procuring it to be written, and enclosing it in an envelope, and by writing his name and causing the witnesses to write their names on the envelope, with the declaration that the paper contained the last will and testament of the testator.

The essence of the *testamentum in scriptis* consists in the writing, and whether it was published to the witnesses who subscribed and attested it, or was concealed from them, was not a fact of any consequence. But the writing contained in the envelope was subject to no formality. It might be written by the testator, or by the hand of another. His signature to the will itself was not required.

The announcement to the witnesses that it was his will, and their attestation of that declaration, and the sufficiency of the seals, were the only securities against forgery or fraud. Other formalities were added, and a rigid exaction of those that were prescribed, rendered this form of testamentary disposition onerous. On the other hand, the nuncupative or oral will was subject to the objections that the witnesses might die, or fail to remember the declarations of the testator, or misrepresent them. In the process of time, the form of making a will orally became unfrequent.

The olographic will and the mystic will *served the purpose of those who desired to conceal the disposition of their property ; while the written will, prepared by a public officer, and attested by witnesses, was the form commonly used on the continent of Europe.

The last-named form, with a reduced number of witnesses, was permitted in Spain by the law of Toro. This testament might be made before a notary public, but he was not indispensable. If made before a notary public, there should be three witnesses of the vicinage ; but if there was not a notary, five witnesses were necessary, unless they could not be had, in which event three witnesses of the place, or seven strangers, would be sufficient. 1 Tapia Febrero, 364.

The authentication of the will by the intervention of judicial authority is also of Roman origin.

Savigny traces the changes in that administration, and explains

the manner in which this system penetrated the jurisprudence of Europe; 1 Sav. hist. du droit Ro. 83; and the result, as it affects the question under consideration, is clearly ascertained in the writings of the civilians.

Ricard says: "It results from what has been established, that the depositions of the seven witnesses before the judge, when the nuncupative will has not been drawn up in writing at the time it was made, is in a manner of the essence of the testament, since it could not have effect without those depositions." * * * "But in respect to those that were drawn up in writing," he says, "the opening and reading that were made after the death of the testator contributed nothing to the validity of the testament, and served only to verify the seals of the witnesses, and to render the testament public. We see, however, from laws of the title, in what manner shall testaments be opened (*quem ad mod. testam. oper.*) in the code and digest, that it was the ordinary practice for those who were interested in the execution of the testament to apply to the prætor, who obliged the testamentary witnesses to come before him to admit or deny their signatures and seals, and of which he made a *proces verbal*; and that this is the practice in the countries where the Roman law prevails."

Ricard des don. 1325-1398.

[* 362] * The Mexican jurists agree that the written testament from its form is not a public and authentic act, and that it is necessary, to the full enjoyment of their rights, that those interested in the will should invest it with that quality. They show that such a person may compel the production of a will from private custody, and that the witnesses may be examined in reference to all the circumstances relative to the execution of the will, and the capacity and death of the testator; and if it shall result from these that the testament is legal, the judge may order it to be protocolled, and it obtains the faith due to an authentic or public act. These writers describe the measures to be taken in case of the death or absence of the witnesses, in order to obtain the same result. 2 Sala Mex. 127, 128; 2 Curia Felip. Mej. 327; 2 Febrero Mej. ch. 25, section 5.

We do not consider it necessary to inquire whether the elevation of this writing to the grade of an authentic act was a necessary condition to the support of a suit upon it by an heir or legatee in the ordinary tribunals in the department of California. We think it is clear that the heir was not restrained from entering upon the inheritance, by the fact that this was not done; and that there are circumstances that would have authorized the heir to maintain

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a suit, even though the testament could not be produced. The right exists independently of that evidence. *Merlin, verbo preuve. Gab. des preuves*, 368, 450. This testator died in 1848. His devisee seems to have taken possession of the property bequeathed to him. There is no testimony of any action by the tribunals in California previously to the organization of the State government. We know that the political condition of California from the time of the death of the testator until the organization of that government was chaotic, and no inference can be drawn from such an omission. Immediately after the organization of that government, the common law of England was introduced, and the ancient legal system of the department abrogated. No provision was made for the probate of wills that had been executed before the introduction of that system. "The statute of the State," say the supreme court of California, "fails * to require wills executed before its passage to be probated;" and "this was not a *casus omissus*," but "the legislature actually intended to exclude them from the operation of the statute altogether, leaving their validity to rest upon the laws under which they were made."

Grimes v. Norris, 6 Cal. R. 621.

And in *Castro v. Castro*, 6 Cal. R. 158, they say, that a will is regarded by the courts of England and the United States as a conveyance, and takes effect as a deed, on proof of its execution, unless there be some express statute requiring it to be probated. Conceding, therefore, that, under the Mexican system, the preliminary proof of the will before some public authority was necessary to give it probative force in a court of justice, that condition has been altered by the statutes of California before adverted to.

Our conclusion is, that the codicil was not inadmissible as testimony, because it had never been admitted to probate, and because the witnesses who were present at its execution had never been examined to establish it as an authentic act. The next inquiry will be, whether the codicil is null because it does not appear on the face of the will that the witnesses were present during the whole time of the execution of the will, and heard and understood the dispositions it contained. The laws that prescribe these formalities do not require that express mention shall be made of their observance under the penalty of the nullity of the testament. In *Bonne v. Powers*, 3 Martin, N. S. 458, the question arose in Louisiana upon a will made in 1799, before the change of government.

The supreme court say: "The Spanish law did not require, as our code does, it should appear on the face of the instrument itself that all the formalities necessary to give effect to a will previous to

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the signature of the testator and the witnesses had been complied with." In *Sophie v. Duplessis*, 1 Louis. Ann. R. 724, the supreme court say: The principle invoked by the defendants, that a will must exhibit upon its face the evidence that all the formalities required for its signature have been fulfilled, has no application to nuncupative testaments under private signatures. Such [* 364] testaments are not required *to make full proof of themselves, and the observance of formalities which do not appear on the face of the will may be shown by testimony *dehors* the instrument. Biec, in his supplement to Escriche, reports the case of a mystic will attached for nullity, because the solemnities required for those of that class, in the law of the Partidas before cited, did not appear to have been followed. The supreme tribunal of justice in Spain sustained the will. Sup. al. dic. v. Testamento. And the same conclusion is maintained by the French jurists upon similar statutes. Merl. Rep. v. Testament.

In order to show that the codicil was valid and translativ of property, the defendant introduced evidence of a custom in California as to the manner of making wills, and the jury were instructed that the evidence was competent; and that, if the custom was so prevailing and notorious that the tacit assent to it of the authorities may be presumed, it will operate to repeal the prior law. The civilians state that customs which are opposed to written law are held to be invalid, unless they have been specially confirmed by the supreme power of the State, or have existed immemorially; and it is not material whether they consist in the non-observance of the written law, or in the introduction of principles or practices opposed to such law; that every valid custom presupposes a rule, observed as binding by the persons who are subjected to it, by an unbroken series of similar acts; and that it belongs to the sound, legal discretion and conscience of the tribunals to determine by what testimony such a custom can be established.

Lind's Study of Juris. 14, 17; and note.

The Spanish codes recognize these principles. They say, to establish a custom, the whole or greater part of the people ought to concur in it; that ten years must have elapsed amongst persons present, and twenty at least amongst persons absent, in order to its being introduced; that it may be proved by two sentences of judges or judgments given upon or according to it; that, being general and immemorial, it may repeal or alter the anterior law, the approbation of the prince being supposed or presumed.

De Asso & Rodri. Inst. ch. 1. 1 Febrero, 55.

[* 365] *The custom under consideration is one of a general

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nature, and its existence for the period must be assumed from the verdict of the jury. It is a rule of property pervading in its application, and necessary to be known in order that judicial administration should be carried on. The recognition of such a rule, if it exists, was therefore to be looked for from the superior and supreme tribunals of the State of California. In the case of *Panaud v. Jones*, 1 California R. 497-505, the supreme court say: "The custom with respect to the execution of wills, so far as the testimony goes, appears to have prevailed generally and for a long time in California. It may have been the universal practice from the first settlement of the country." In *Castro v. Castro*, 6 Cal. 158, this observation is cited, and the court say: "That it is shown, from the testimony of various witnesses, that two [witnesses to a will] were sufficient under the customs of California." The same fact is restated in the case of *Tevis v. Pitcher*, 10 Calif. R. 465.

Nor is such a change in the mode of transfer of property a singular fact in the history of the American States. Several cases are mentioned in the opinion of the court in *Panaud v. Jones*, above cited, and a similar instance is mentioned in *Fowler v. Shearer*, 7 Mass. 14.

Nor is the existence of such a departure from the written law extraordinary, when the circumstances of the early history of the department are understood. The most important of the arrangements for the colonization of the department related to the establishment of the military districts and presidios, and the mission establishments in close proximity to them. The priests and soldiers were the most conspicuous and influential members of the department, and exerted supreme influence in its political and economical arrangement. The Spanish laws relieved the soldier from the inconvenient formalities that attended the execution of the ordinary nuncupative or closed testament, and authorized him to make a nuncupative will before two witnesses, or an olographic will.

The canon law distinctly reprobates (*præscriptam consuetudinem improbamus*) the requirement of seven or five witnesses for the testation of a will: "*secundum quod leges humanæ decernunt*;" * * * "*quia vero a divina lege et sanctorum [* 366] Patrum institutis et a generali ecclesiæ consuetudine id noscitur esse alienum cum scriptum sit, in ore duorum vel trium testium stet omne verbum.*" Decret. Greg. lib. 3, tit. 26, ch. 10.

The precept and example of these dominant classes in the department may possibly have exercised a controlling influence in forming the habitude of the population on this subject. And if

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it became prevailing and notorious, so as that the assent of the public authorities may be presumed, upon principles existing in the jurisprudence of Spain and Mexico, the acts of individuals, in accordance to it, are legitimate. This codicil was written in the Spanish language; and it is to be inferred that there was testimony that the testator and one or more of the witnesses understood that language imperfectly.

The instructions of the circuit court required the jury to find that the testator dictated the contents of the codicil to the witnesses, they being assembled at the same time, and that it should be then read in the presence of all, so that it was understood by all, and that the testator should then have declared it to be his last will; and the court informed them that if the testator did not understand the language, and there was not present any one who explained and interpreted the codicil in the presence and hearing and understanding of the witnesses, the document was not a valid instrument; and also, if neither the testator nor a sufficient number of the witnesses understood the language of the codicil, that it was not valid.

The Roman law did not require the witnesses to a Latin will to understand the Latin language: "*nam si vel sensu percipiat quis, cui rei adhibitus sit, sufficere.*" It is admitted by the civilians that a testator may dictate his will in his own language, and the will may be drawn in another, provided that the witnesses and notary understand both. The object of the law is that the instrument shall express the intentions of the testator, and it does not require the reproduction of his exact words. Whether the witnesses should understand the language of the will, has been the subject of much contest among those writers; and names of authority may [* 367] be cited in favor of * either opinion. But the current of judicial authority seems to have decided it is not necessary that the witnesses to a testament should comprehend the language in which it is written. And the same authority has settled that the witnesses should understand the language of the testator.

16 Dalloz. jur. gen. tit. disposi. entre vifs. et test. No. 3126; 3 Trop. don. & test. No. 1526; 2 Marcad. Exp. 15; Escriche dicc. verb. interprete.

The instruction of the presiding judge to the jury, that the testator and witnesses should alike hear and understand the testament, and that, under these conditions, its publication as the will of the testator should be made, embraced all that it was necessary to be said upon this part of the case.

The last inquiry to be made refers to the weight to be given to

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the testimony adduced in support of the *factum* of the codicil. This consists of the proof of the signatures of the deceased witnesses and of the testator, and of some declaration by him that he had made a will with a similar devise. We comprise, among the witnesses to the will, Ridley, the *sindico*. It does not appear that a *sindico* was charged with any function in the preparation or execution of testaments by the law or custom of California. Nor is it clear that the *sindico* in the present instance expected to give any sanction to the instrument by his official character. He attests the execution of the will, and we cannot perceive why the description of himself which he affixes to his signature should detract from the efficacy of that attestation.

The binding force and legal operation of this codicil are to be determined by the law, as it existed when the codicil was made. But the mode in which it should be submitted to the court and jury, and the effect to be given to the testimony that accompanied it, depend upon the law of the forum at the time of the trial. The evidence of the signatures of the testator and witnesses was competent; and it was a proper question to be submitted to the jury, whether, under the circumstances of the case, it was probable the formalities required by * the law were [* 368] complied with. As suppletory proof that the testator had made the codicil, and was acquainted with the contents of the instrument, the admission or declaration offered as evidence was competent testimony.

Upon a review of the whole case, our opinion is, there is no error in the record, and the judgment of the circuit court is affirmed.

WILLIAM WISEMAN, Plaintiff in Error, v. ACHILLE CHIAPELLA.

23 H. 368.

BILL OF EXCHANGE—PROTEST—DEMAND, &c.

1. A notary public who has called several times at the business place of the acceptor of a bill of exchange on the day on which it is payable, and finds no person present to answer his demand, is not bound to seek such acceptor at his private residence.
2. His certificate that, with the draft in his possession, he had called several times on that day at the business place of the acceptor, is *prima facie* evidence that it was done at proper business hours; and if this is denied, the proof that it was not so devolves on the party disputing it.
3. The law in this respect, as regards presentation for acceptance, differs from presentation for payment.

WRIT of error to the circuit court for the eastern district of Louisiana. The case is fully stated in the opinion.

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Mr. Benjamin, for plaintiff.

Mr. Janin, for defendant.

[* 373] * Mr. Justice WAYNE delivered the opinion of the court.

The plaintiff in this action alleges that he is the holder and owner of a certain bill of exchange for two thousand and forty-five dollars forty-five cents, dated at Vicksburg, in the State of Mississippi, May 13th, 1855, and payable on the 23d November, 1855, which had been drawn by John A. Durden and A. Durden

on William Langton & Co., of New Orleans, and accepted [* 374] by them; payable to the order of Langton, Sears & * Co., and by that firm indorsed in blank. He further declares that the bill, when it became due, was intrusted to the defendant, Achille Chiapella, a commissioned notary public for the city of New Orleans, to demand payment of it from the acceptors, and to protest the same for non-payment, should the acceptors dishonor it; and that, from his carelessness in not making a legal demand of the acceptors, and from not having expressed it in the protest, that the indorsers of the bill had been discharged from their obligation to pay it, by a judgment of the circuit court of the United States for the southern district of Mississippi. He further alleges that the acceptors, payees, and indorsers, were insolvent, and that, from the insufficiency of the demand for payment to bind the drawers of the bill, the defendant had become indebted to him for its amount, with interest at the rate of five per cent. from the day that it became due—the 23d November, 1855.

The defendant certifies in his notarial protest that the bill had been handed to him on the day it was due; that he went several times to the office of the acceptors of it, in Gravier street, in order to demand payment for the same, and he found the doors closed, and “no person there to answer my demand.” It also appeared that one of the firm by which the bill had been accepted had a residence in New Orleans; that no demand for payment had been made individually upon him; and that no further inquiry had been made for the acceptors than the repeated calls which the notary states he had made at their office.

We think, under the circumstances, that such repeated calls at the office of the acceptors was a sufficient demand; that further inquiry for them was not required by the custom of merchants; and that the protest, extended as it had been, is in conformity with what is now generally considered to be the established practice in such matters in England and the United States. We say, under the circumstances, for, as there is no fixed mode for making

such a demand in all cases, each case as it occurs must be decided on its own facts.

We have not been able to find a case, either in our own or in the English reports, in which it has been expressly ruled *that a merchant, acceptor of a foreign bill of exchange, [* 375] having a notorious place of business, has been permitted to close it up during the business hours of the day, thus avoiding the obligation of his acceptance on the day of its maturity, and then that he was allowed to claim that the bill ought to have been presented to him for payment elsewhere than at his place of business. Though such conduct is not absconding, in the legal sense of that word, to avoid the payment of creditors, it must appear, when unexplained, to be an artifice inconsistent with the obligations of an acceptor, from which the law will presume that he does not intend to pay the bill on the day when it has become due.

The plaintiff in this case does not deny that the office of the acceptors was closed, as the notary states it to have been. The only fact upon which he relies to charge the defendant with neglect is, that one of the firm of Langton, Sears, & Co. resided in New Orleans, and that it was the duty of the notary to have made inquiry for him at his residence. No presumption, under such circumstances, can be made, that the acceptors had removed to another place of business, or that they were not intentionally absent from it on the day that they knew the bill was payable. This case, then, must be determined on the fact of the designed absence of the acceptors on that day; and that inference is strengthened by no one having been left there to represent them.

All merchants register their acceptances in a bill book. It cannot be presumed that they will be unmindful of the days when they are matured. Should their counting-rooms be closed on such days, the law will presume that it has been done intentionally, to avoid payment, and, on that account, that further inquiries need not be made for them before a protest can be made for non-payment.

Cases can be found, and many of them, in which further inquiries than a call at the place of business of a merchant acceptor has been deemed proper, and in which such inquiries not having been made, has been declared to be a want of due diligence in making a demand for payment; but the rulings in such cases will be found to have been made on account of *some peculiar [* 376] facts in them which do not exist in this case. And in the same class of cases it has been ruled that the protest should contain a declaration by the notary that his call to present a bill for payment had been made in the business hours of the day; but in no

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case has the latter ever been presumed in favor of an acceptor, whose place of business has been so closed that a demand for payment could not be made there upon himself or upon some one left there to attend to his business.

Lord Ellenborough said, in the case of *Cross v. Smith*, 1 M. and S. 545: "The counting-house is a place where all appointments respecting business and all notices should be addressed; and it is the duty of the merchant to take care that proper persons shall be in attendance." It was also ruled in that case, that a verbal message, imparting the dishonor of a bill, sent to the counting-house of the drawer during the hours of business, on two successive days, the messenger knocking there, and making a noise sufficient to be heard within, and no one coming, was sufficient notice.

In this case the facts were, that Fea & Co. had a counting-house at Hull, where they were merchants, and one lived within one mile and the other within ten miles of Hull. The Monday after *Smith & Co.* received the bill, their clerk went to give notice, and called at the counting-house of Fea & Co. about half after ten o'clock. He found the outer door open; the inner one locked. He knocked so that he must have been heard, had any one been there, waited two or three minutes, and went away; and on his return from the counting-room he saw Fea & Co.'s attorney, and told him. The next Monday he went again at the same hour, but with no better success. No written notice was left, nor was any notice sent to the residence of either of the parties. The court took time to consider, and then held, without any reference to the clerk having called at the counting-house two successive days, that going to the counting-house at a time it should have been open was sufficient, and that it was not necessary to leave a written notice, *or to send to the residence of either of the parties.*

In *Bancroft and Hall*, Holt, 476, the plaintiff received [*377] notice *of the bill's dishonor at Manchester, 24th May.

The same day he sent a letter by a private hand to his agent at Liverpool, to give defendant notice. The agent called at the defendant's counting-house about six or seven p. m.; but the counting-house was shut up, and the defendant did not receive notice of the dishonor of the bill until the morning of the 27th—Monday. Two points were ruled: 1st. That sending by a private hand to an agent to give notice was sufficient; 2d. That it was sufficient for the agent to take the ordinary mode to give notice—the ordinary time of shutting up was eight or nine. Where the indorser of a note shut up his house in town soon after the note was made, and before it became due, and retired to his house in the country,

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intending, however, only a temporary residence in the country, it was held that a notice left at his house, by having been put into the key-hole, was sufficient to charge him. *Stewart v. Eden*, 2 Can. R. 121.

This court held, in *Williams v. The Bank of the United States*, 2 Peters, that sufficient diligence had been shown on the part of the holder of a note to charge the endorser, under the following circumstances: A notary public employed for the purpose called at the house of the endorser of a note, to give him notice of its dishonor; and finding the house shut and locked, ascertained from the nearest resident that the endorser and his family had left town on a visit. He made no further inquiry where the endorser had gone, or how long he was expected to be absent, and made no attempt to ascertain whether he had left any person in town to attend to his business, but he left a notice of the dishonor of the note at an adjoining house, requesting the occupant to give it to the endorser upon his return.

In making a demand for an *acceptance*, the party ought, if possible, to see the drawee personally, or some agent appointed by him to accept; and diligent inquiry must be made for him, if he shall not be found at his house or place of business; but a demand for payment need not be personal, and it will be sufficient if it shall be made *at one or the other place in business hours*. Chitty, 274, 367.

* It was formerly the practice, if the house of the [* 378] acceptor was shut up when the holder called there to present the bill for payment, and no person was there to represent him, and it appeared that he had removed, that the holder was bound to make efforts to find out to what place he had removed, and there make a payment. Such, however, is no longer the practice either in England or in the United States, nor has it been in the United States for many years. It is now sufficient if the bill shall be taken to the residence of the acceptors, as that may be stated in the bill, for the purpose of demanding payment, and to show that the house was shut up, and that no one was there. *Hine v. Alleby*, 4 B. & Adol. 624. It has been decided by the supreme court in Tennessee, that the protest of a foreign bill of exchange, drawn upon a firm in New Orleans, with no place of payment designated, where it appeared that the deputy of a regularly commissioned notary had called several times at the office of the acceptors to make demand of payment, but found no one there of whom the demand could be made, was sufficient to excuse a demand, and to fix the liability of the endorsers to whom notice

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had been given. *Union Bank v. Jephtha Fowlkes et al.* 555. The supreme court of Louisiana, in *Watson v. Templeton*, 11 Annual, 137, declares "that a demand made within the usual hours of business, at the commercial domicile of a partnership, for the payment of a note or bill due by the firm, is a sufficient presentment; that it was not necessary to make a further demand at the private residences of individual persons. The place of business is the domicile of the firm, and it is their duty to have suitable persons there to receive and answer all demands of business made at that place." Going with a promissory note, to demand payment, to the place of business of the notary, in business hours, and finding it shut, is using due diligence. 1 Pick. *Shed v. Brett*, 413.

In the case of the B. B. at Decatur *v. Hodges*, the supreme court of Alabama say: "The court below excluded the protest for non-payment, because the presentment is stated thereon to have been made of the bookkeeper of the drawees in their counting-[* 379] room, they being absent. This was erroneous. * The bill was presented at the place of business of the firm, at their counting-room. If they had intended to pay the bill, it was their duty to have been present on the day of payment, or to have left means for making such payment in charge of some one authorized to make it. The notary finding them absent from their place of business, and their bookkeeper there, might well make protest of the dishonor of the bill for non-payment upon presentment to and refusal by him." When, upon presentment for acceptance, the drawee does not happen to be found at his house or counting-room, but is temporarily absent, and no one is authorized to give an answer whether the bill will be accepted or not, in such case it would seem the holder is not bound to consider it as a refusal to accept, but he may wait a reasonable time for the return of the drawee. He may present the bill on the next day, but this delay is not allowable in a presentment for payment. This must be made on the day the bill falls due; and if there be no one ready at the place to pay the bill, it should be treated as dishonored, and protested. Story on Bills, sec. 250; Chitty on Bills, 9 ed. 400. The supreme court of New York has ruled that where a notary's entry case states that presentment and demand were made at the maturity of a bill, at the office of C. & S., the acceptors, this language imports that the office was their place of business, and it will be presumed in favor of the notary, that the time in the day was proper. *Burbank, President of Eagle Bank of Rochester, v. Beach and others*, 15 Barbour, 326.

The preceding citation is in conformity with what the supreme

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court of New York had ruled thirteen years before, in the case of the Cayuga Bank v. Hart, 2 Hill, 635. Its language is, that where a notarial certificate of a protest of a bill of exchange stated a presentment for payment at the office of an acceptor, on the proper day, and that the office was closed, but *was silent as to the hour of the day of doing the act, that it was sufficient, and the regularity in that particular should be presumed.*

We infer, from all the cases in our books, notwithstanding many of them are contradictory to subsequent decisions, that the practice now, both in England and the United States, does * not require more to be done, in the presentment of [* 380] a bill of exchange to an acceptor for payment, than that the demand should be made of a merchant acceptor at his counting-room or place of business; and if that be closed, so in fact that a demand cannot be made, or that the acceptor is not to be found at his place of business, and has left no one there to pay it, that further inquiry for him is not necessary, and will be considered as due diligence; and that presenting a bill under such circumstances at the place of business of the acceptor will be *prima facie* evidence that it had been done at a proper time of the day. If that shall be denied, it must be shown by evidence.

But whatever may have been the differences between cases upon this subject, both in England and the United States, there has always been a requirement in both countries, and everywhere acknowledged in the United States, which protects the defendant in this suit from any responsibility to the plaintiff. The requirement is this: that the protest was made in this case in conformity with the practice and law of Louisiana, where the bill was payable. *Rothschild v. Caine*, 1 Adol. and Ell. 43; 11 Smedes and Marshall, 182.

We are aware of the contrariety of opinion which prevailed for many years in regard to what should be considered due diligence in making a presentment of a bill of exchange for payment to an acceptor of it, under such circumstances as are certified to by the notary in this case. We have carefully examined most of them, from the case of *Cotton v. Butler*, in Strange, 1086, to the year 1856, and we have adopted those of later years as our best guide, and as having a better foundation in reason for the practice and the commercial law of the present day, and because we think it has mostly prevailed in the United States for thirty years.

As the view which we have taken of this case disposes of it in favor of the defendant, we shall not notice another point made in the argument in his behalf, which was, that the plaintiff's right

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of action, if he ever had one against the defendant, was excluded by the Louisiana law of prescription.

We direct the affirmance of the judgment of the circuit court.

CHRISTIAN A. ZABRISKIE, Appellant, v. THE CLEVELAND, COLUMBUS, AND CINCINNATI RAILROAD COMPANY and others.

23 H. 381.

POWER OF RAILROAD CORPORATIONS TO GUARANTY BONDS OF OTHER CORPORATIONS—
RATIFICATION OF ACTS BY PRESENCE OF STOCKHOLDERS.

1. The acts of the Ohio legislature of 1851 and 1852, which authorized railroad companies to aid other railroad companies by means of subscription to their capital stock or otherwise, authorized a guaranty of their bonds.
2. If an acceptance of the act of 1852 by one of these corporations was necessary, this acceptance may be inferred in favor of persons holding guarantied bonds by the companies doing the acts authorized by these statutes.
3. As against innocent purchasers for value of such guarantied bonds, a stockholder will not be permitted to contest the validity of the guaranty who was present at a meeting called to ratify the act of the board in making the guaranty, and who declined to vote against a resolution ratifying the act, which could not have passed if he had voted against it.

APPEAL from the circuit court for the northern district of Ohio.
The case is very fully stated in the opinion.

Mr. Ould and *Mr. Benjamin*, for appellant.

Mr. Stanbery and *Mr. Ewing*, for appellees.

[*390] *Mr. Justice CAMPBELL delivered the opinion of the court.

The appellant is a stockholder of the Cleveland, Columbus, and Cincinnati Railroad Company, a corporation existing by the law of Ohio, and empowered to construct a railroad from Cleveland south, and having a capital of more than \$4,300,000 distributed among above nine hundred stockholders. The appellant complains, that this corporation, in April, 1854, illegally indorsed a guaranty upon four hundred bonds of one thousand dollars each, with interest coupons at the rate of seven per cent. per annum, payable to Elias Fossett or bearer in New York, in 1869, that had been issued in that month by the Columbus, Piqua, and Indiana Railroad Company, and which were also indorsed by the Bellefontaine and Indiana Railroad Company, and the Indianapolis and Bellefontaine Railroad Company, to the prejudice of the stockholders, and the burden of the resources of the said Cleveland corporation. The object of the bill was to obtain a decree to re-

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strain the company, pending the suit, from paying the interest, and upon a declaration of the illegality of the bonds, to enjoin the corporation from applying any of its effects to their redemption.

The three defendants are holders of five of the bonds, who have availed themselves of the invitation of the bill to all their class to become defendants, and who assert that they are *bona fide* holders, and that their securities are valid obligations of the company. This issue of the obligations of these four corporations originated in a negotiation among their officers, in *1854, [* 391] to determine upon a uniform gauge for all their roads and to promote intimate connections in their transit operations.

The Piqua road and the Indianapolis road were projected to extend from Columbus to Indianapolis, (one hundred and eighty-five miles,) and were partially finished at a gauge of four feet eight and one half inches, and had agreed to maintain this gauge for their common interest. At Columbus they were to connect with roads of the same gauge, leading through Ohio and Pennsylvania to Philadelphia.

The Cleveland and the Bellefontaine railroads were constructed upon the Ohio gauge, of four feet ten inches, and the companies were interested to detach the other corporations from their Pennsylvania connection, and to combine them with their own and other companies, whose roads passed through Cleveland, along the shores of the lakes into New York, and connected there with the railroad and canal communications of that State. The Piqua road was at this time finished only forty-six miles, and the company was embarrassed, and their work suspended for want of money. The Indianapolis company were willing to change the gauge of their road to the Ohio pattern, but were withheld by their contract with the Piqua Company. In January, 1854, the Piqua Company appointed a committee from their board of directors to negotiate for money or securities sufficient to complete their road, and to discharge their debts, other than bond debts, and were authorized to prepare six hundred bonds of one thousand dollars each, of the usual form, to be secured by a mortgage, being the third mortgage of their franchises and road. They were also empowered to determine the gauge of the road, and either to maintain their existing connections, or to consent to the adoption of the Ohio gauge in conjunction with the Indianapolis Company.

This committee opened their negotiations in Philadelphia, but pending these the vice president of the company (Dennison) "sounded the inclinations" of the Cleveland Company, by intimating that if that company would endorse a portion of the bonds,

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and take some of the stock of the Piqua Company, the Pennsylvania connection would be abandoned. Some assurance [* 392] having been given by the president of the Cleveland Company to him, he, with the financial agent of the company, (Niel,) arranged a contract with the committee of the Piqua Company to purchase the six hundred bonds, to guaranty a subscription for \$50,000 of their stock at par, and to assume the control of the settlement of all controversies and questions concerning the gauge of the road. These negotiations were pending from the first week in February until the 25th of the month, when the contract was reduced to writing, and the price to be paid settled at \$305,000. On the 7th of March, 1854, Dennison and Niel concluded a contract with the three corporations, Cleveland, Indianapolis, and Bellefontaine, by which they consented to the permanent adoption of the Ohio gauge for the Piqua and Indianapolis roads, and those corporations agreed to guaranty four hundred of the bonds of the Piqua Company before mentioned, and to subscribe for thirty thousand dollars of their stock. This contract was reported shortly after to the boards of the several corporations, and approved, and the bonds were issued and endorsed, and the stock subscribed for in April, 1854. The tracks of the several roads were altered to conform to this arrangement shortly after. The negotiations and contracts of Dennison and Niel were for their own account and benefit. The testimony is conclusive of the fact that the members of the Piqua board were ignorant of the assurances they had received of the disposition of the Cleveland and other companies to enter into such engagements. Dennison had been a director of this company from its organization; but before signing the contract of the 25th February, with the Piqua Company, he exhibited a written resignation, and that resignation was entered upon the minutes of the board before the approval of the contract or the issue of the bonds to him and his associate.

This transaction was reported to the stockholders of the endorsing corporations in July, 1854, and accepted by them as the act of the company. The board of directors of the Cleveland Company, on the 16th June, resolved, that there should be submitted to a vote of the stockholders, at a meeting on the 1st July proximo, four propositions for the aid of other roads desiring to [* 393] form a connection with that company, under the * 4th section of a statute of Ohio, passed 3d March, 1851. Among these was the endorsement of four hundred bonds of the Piqua Company. Notice was given of this meeting by advertisement in the daily papers of Cleveland and Columbus, and a daily paper in

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New York, but it did not disclose the object of the meeting. Above eighteen thousand shares of stock were represented, and the following resolution was adopted without a dissenting vote:

Resolved, "That the endorsement jointly and severally with the Bellefontaine and Indiana Railroad Company, and the Indianapolis and Bellefontaine Railroad Company, of four hundred thousand dollars of the third mortgage bonds of the Columbus, Piqua, and Indianapolis Railroad Company, by order of the board, March 6th, 1854, be and the same is approved, adopted, and sanctioned, by this meeting, as the proper act of this company." But, although there was no dissent in the vote, there was dissatisfaction openly expressed by the proxy of the appellant, and of a majority of the stockholders represented at the meeting, and who declined to vote on the resolution. The bonds were offered for sale in the city of New York in the summer of 1854 and the spring of 1855, under an uncontradicted representation of their validity through the votes above mentioned, and were freely purchased at fair prices. The interest was paid by the Piqua Company until October, 1855, when the installment due in that month was discharged by the endorsers in equal proportions. In the spring of 1856, the Piqua Company having become insolvent, the appellant served a notice upon the Cleveland Company not to pay any portion of the principal and interest that might become due on the bonds, and required them to sue for the cancellation of their guaranty, and demanded his share of the profits of the company, without the reservation of any part for the payment of the bonds, and immediately after filed the bill in this cause.

He contends, that the sale by the Piqua Company to Dennison and Niel is void, under a statute of Ohio that prohibits any director of a railroad company to purchase, either directly or indirectly, any shares of the capital stock, or any of the * bonds, notes, or other securities, of any railroad com- [* 394] pany of which he may be a director, for less than the par value thereof; and it declares: "That all such stocks, bonds, and notes, or other securities, that may be purchased by any such directors for less than the par value thereof, shall be null and void."

He insists that the endorsement of the bonds of the Piqua Company was of no advantage to the Cleveland Company, but was merely to consummate the success of a speculation of Dennison and Niel—a speculation reprobated by the law of Ohio; that the Cleveland Company were not empowered by their charter to guaranty the contracts of corporations or individuals; that this endorsement was not required for the construction of the road, or in the course of the

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business of the company, or to promote an end of the incorporation; and that none of the acts of the general assembly of Ohio authorize it.

He denies any efficacy to the vote of the stockholders in July, 1854, because the notice was insufficient, in the length of the time and in the failure to disclose the purpose of the call; that more than one-half of the stock of the company was not represented, and two-thirds of that present did not vote, for the want of proper information and counsel on the subject. That the meeting were ignorant of material facts; they were not advised of the relations of Dennison and Niel to the Piqua Company, and their connection with the bonds, when the vote was taken; and were deceived as to the condition of the Piqua Company. He avers that the bondholders are chargeable with notice of the fact that the endorsement was made before the meeting of the stockholders, and by the authority of the directors only.

The testimony does not convict the defendants—the bondholders—of complicity in the negotiations or contracts that preceded the issue of the bonds, nor does any equivocal circumstance appear in their purchase of those securities. It is proved that it is a common practice for railroad corporations to make similar arrangements to enlarge their connections and increase their business. The Cleveland Company had encouraged this practice by precept and example. In a report of their board of directors, in January, [* 395] 1854, the company * were informed of their establishment of a line of first-class steamboats between Cleveland and Buffalo, and of their guaranty of the bonds of other companies for three hundred thousand dollars; of subscriptions for stock to the extent of one hundred thousand dollars, and of promised aid to still another company. They say: "These companies may need additional assistance, and others proposing to intersect ours may, by a moderate loan of money or credit, be enabled to finish their roads, and establish with us business relations, for the mutual benefit of both parties, while the advances on our part may be made safe and remunerative. Unless advised of your disapprobation, the board will continue to pursue this policy."

No such disapprobation was expressed as to check the board of directors until the guaranty of these bonds had been sanctioned, in July, 1854, at a meeting of the stockholders. The discussion was confined to the circle of the corporation, until after the failure of the Piqua Company to pay a second installment of interest. Then the appellant filed this bill.

The frame of the bill implies that this contract exceeds the power

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of the corporation, and cannot be confirmed against a dissenting stockholder. His authority to file such a bill is supported upon this ground alone. *Dodge v. Walsey*, 18 How. 331; *Mott v. Penn. R. R. Co.* 30 Penn. 1; *Manderson v. Commercial Bank*, 28 Penn. 379.

The usual and more approved form of such a suit being that of one or more stockholders to sue in behalf of the others. *Bemon v. Rufford*, 1 Simon, N. S. 550; *Winch v. Birkenhead H. Railway Co.*, 5 De G. and S. 562; *Mosley v. Alston*, 1 Phil. 790; *Wood v. Draper*, 24 Barb. N. Y. R.

A court of equity will not hear a stockholder assert that he is not interested in preventing the law of the corporation from being broken, and assumes that none contemplate advantages from an application of the common property that the constitution of the company does not authorize.

The powers of the Cleveland Company are vested in a board of directors chosen from the company. They are authorized to construct and maintain their road, and for that purpose can employ the resources and credit of the company, and execute * the requisite securities, and are required to exhibit annually a clear and distinct statement of their affairs to a meeting of the stockholders. In the year 1851 a general law relating to railway companies empowered them "at any time, by means of their subscription to the capital stock of any other company, or otherwise, to aid such company in the construction of its railroad, for the purpose of forming a connection of said last-mentioned road with the road owned by the company furnishing such aid; * * * and empowered any two or more railroad companies whose lines are so connected to enter into any arrangement for their common benefit, consistent with and calculated to promote the objects for which they were created: Provided, that no such aid shall be furnished nor any * * * arrangement perfected until a meeting of the stockholders of each of said companies shall have been called by the directors thereof, at such time and place and in such manner as they shall designate; and the holders of at least two-thirds of the stock of such company represented at such meeting in person or by proxy, and voting thereat, shall have assented thereto."

This section was re-enacted in the following year, in a general act for "the creation and regulation of incorporated companies in Ohio," which last act provides that "any existing company might accept any of its provisions, and when so accepted, and a certified copy of their acceptance filed with the Secretary of State, that por-

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tion of their charters inconsistent with the provisions of this act shall be repealed." Curwen's Ohio Laws, 949, 1110.

It is contended that neither of these acts was accepted by the Cleveland Company; that the act of 1852 superseded that of 1851, and that the former could be accepted and become obligatory upon the company only in the mode it prescribed. Both of these are general acts, and were designed to enlarge the faculties of these corporations, so as to promote their utility, and to enable them to accomplish with more convenience the objects of their incorporation. This act of 1851 does not divest any estate of the company,

or make such a radical change in their constitution as to [* 397] authorize the * members to say that its adoption without their consent is a dissolution of the body. But for an intimation in an opinion of the supreme court of Ohio (*Chapman & Harkness v. M. R. and L. E. R. R. Co.*, 6 Ohio R. N. S. 119) to the contrary, we should have been inclined to adopt the conclusion that the act of March, 1851, might be operative without the specific or formal assent of the corporations to which it refers, and was not superseded by the act of 1852, as to pre-existing corporations. *Everhart v. P. and U. C. R. R. Co.*, 28 Penn. R. 340; *Gray v. Monongahela N. Co.*, 2 W. and S. 156; *Great W. R. W. Co. v. Rushant*, 5 De G. and S. 290.

The jurisprudence of Ohio is averse to the repeal of statutes by implication; and in the instance of two affirmative statutes, one is not to be construed to repeal the other by implication, unless they can be reconciled by no mode of interpretation. *Cass v. Dillon*, 1 Ohio R. N. S. 607.

The learned compiler of the laws of Ohio retains the act of 1851 as valid, in respect to the corporations then existing. But as between the parties on this record, the acceptance of those acts may be inferred from the conduct of the corporators themselves. The corporation have executed the powers and claimed the privileges conferred by them, and they cannot exonerate themselves from the responsibility, by asserting that they have not filed the evidence required by the statute to evince their decision. The observations of Lord St. Leonards in the House of Lords, (*Bargate v. Shortridge*, 5 H. L. Ca. 297,) in reference to the effect of the conduct of a board of directors as determining the liability of a corporation, are applicable to this corporation, under the facts of this case. "It does appear to me," he says, "that if, by a course of action, the directors of a company neglect precautions which they ought to attend to, and thereby lead third persons to deal together as upon real transactions, and to embark money or credit in a concern of this

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sort, these directors cannot, after five or six years have elapsed, turn round, and themselves raise the objection that they have not taken these precautions, and that the shareholders ought to have inquired and ascertained the matter. * * * The way, therefore, in which I *propose to put it to your lordships, [* 398] in point of law, is this: the question is not whether that irregularity can be considered as unimportant, or as being different in equity from what it is in law, but the question simply is, whether, by that continued course of dealing, the directors have not bound themselves to such an extent that they cannot be heard in a court of justice to set up, with a view to defeat the rights of the parties with whom they have been dealing, that particular clause enjoining them to do an act which they themselves have neglected to do."

This principle does not impugn the doctrine that a corporation cannot vary from the object of its creation, and that persons dealing with a company must take notice of whatever is contained in the law of their organization. This doctrine has been constantly affirmed in this court, and has been engrafted upon the common law of Ohio. *Pearce v. M. and I. R. R. Co.* 21 How. 441; *Strauss v. Eagle Ins. Co.* 5 Ohio, N. S. 59. But the principle includes those cases in which a corporation acts within the range of its general authority, but fails to comply with some formality or regulation which it should not have neglected, but which it has chosen to disregard.

The instances already cited of the course of dealing of this corporation, and others of a similar nature, of which there is evidence in the record, sufficiently attest that the corporation accepted the acts of 1851 and 1852 as valid grants of power; and it would be manifestly unjust to allow it to repudiate the contracts which it has made, because their acceptance of these grants has not been clothed in an authentic form. The supreme court of Ohio have recognized the obligation of corporators to be prompt and vigilant in the exposure of illegality or abuse in the employment of their corporate powers, and have denied assistance to those who have waited till the evil has been done, and the interest of innocent parties has become involved. *Chapman v. Mad River R. R. Co.* 6 Ohio, N. S. 119; *The State v. Van Horne*, 7 Ohio, N. S. 327.

We conclude, that the validity of the contract of the Cleveland corporation, under the circumstances, must be determined on the assumption that it was authorized to exert the * power conferred in the fourth section of the act of March, [* 399] 1851, and 24th section of the act of May, 1852.

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In deciding upon the validity of this contract, we deem it unimportant to settle whether Dennison was a director of the Piqua Company the 25th February, 1854, when he signed the contract with the committee of the Piqua board of directors; or whether that contract was affected by its ratification by the board after his resignation was entered upon the minutes, or by the subsequent consummation of the contract, in the reciprocal transfer of the securities and payment of the consideration; or whether, as matter of law, the bonds of the Piqua Company, commercial in their form, payable to another party, and issued after his resignation, are null and void.

The contract of the guarantors indorsing the bonds is a distinct contract, and may impose an obligation upon them independently of the Piqua Company. In the absence of a personal incapacity of Dennison to deal with his principal, the issue of the bonds by the directors of the Piqua Company is an ordinary act of administration; and bonds in such form, it is admitted, "challenge confidence wherever they go." We perceive no illegality in their delegation to them of the power to determine whether the Ohio or Pennsylvania gauge should be adopted, or their sale of the privilege to adjust the controversies and questions relating to it. Their adoption of the Ohio gauge was a solution of all the difficulties; it enabled the Indianapolis Company to adopt it; it superinduced the resulting consequence of running connections among the four corporations; it secured profits to the guarantors; it imposed the burden of relaying their track upon the Piqua Company. Their contract to adopt this gauge and to form the corresponding connections is a valuable consideration, and the Piqua Company have fulfilled the engagements that Dennison and Niel were authorized to stipulate on their behalf. There is testimony that the bargain was a hard one for the guarantors, and argument that it was probably an unjust one, and possibly fraudulent in reference to the stockholders of the Cleveland Company. But the bill is framed, not to obtain relief from error or fraud in the administration of the powers of the company by their trustees, but against the exercise of powers that did not belong to the corporation, and which the body could not confirm, except by a unanimous vote. *Foss v. Harbottle*, 2 How. 461; 2 Phil. Ch. R. 740.

We proceed to consider of the effect of the sanction given to the arrangements of the Cleveland Company, through Dennison and Niel, with the Piqua Company, by the vote of the meeting in July, 1854. It is objected that the notice of this meeting was insufficient,

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and that, unprepared as the corporators were, the proxy appointed by the non-resident stockholders was overpowered by the heat and passion of the directors and their adherents. There is some force in the complaint that this meeting was not conducted with a due respect for the social rights of a portion of the stockholders. But the time, place, and manner of the meeting were appointed by the directors, as the act of 1851 permits. The proxy of the appellant was there, exhibited his instructions, discussed the propositions submitted, and declined to vote, when his vote would have controlled the action of the meeting. Since that time, several annual meetings have been held, at which the appellant was represented. The circumstances of the contract and its effects have been developed, and yet the resolution sanctioning this contract has not been rescinded. It may be that among the stockholders, and within the corporation, the cause of this procrastination and hesitancy to act upon the subject may be estimated properly. But we are to regard the conduct of the corporation from an external position. * The community at large must form their judgment of it from the acts and resolutions adopted by the authorities of the corporation and the meeting of the stockholders, and by their acquiescence in them. These negotiable securities have been placed on sale in the community, accompanied by these resolutions and votes, inviting public confidence. They have circulated without an effort on the part of the corporation or corporators to restrain them, or to disabuse those who were influenced by these apparently official acts. Men have invested their money on the assurance they have afforded.

A corporation, quite as much as an individual, is held to a * careful adherence to truth in their dealings with [* 401] mankind, and cannot, by their representations or silence, involve others in onerous engagements, and then defeat the calculations and claims their own conduct had superinduced. → The opinion of the court is, that the injunction granted upon the bill of the appellant was improvidently granted, and that he is not entitled to the relief he has sought; and that the decree of the circuit court dissolving the injunction and dismissing the bill is correct, and must be affirmed.

THE ORIENTAL MUTUAL INSURANCE COMPANY, Plaintiff in Error, v.
JOHN S. WRIGHT, for the use of Maxwell, Wright & Co.

23 H. 401.

MARINE INSURANCE—OPEN POLICY.

The policy named one and a half per cent. as a nominal rate, with provisions that there should be "an additional premium if by vessels lower than A 2, or by foreign vessels," and that "the premiums on risks should be fixed at the time of the indorsement, and such clauses to apply as the company may insert as the risks are successively reported." Held:

1. That in case of a risk reported on a vessel rating lower than A 2 it was the right of the company to fix the rate of premium, and unless the assured accepted those rates and paid or secured the premium no contract of assurance was made.
2. An instruction of the court that the contract was complete when the risk was reported, and that the rate of premium to be paid was to be determined in such case by the court and jury on the trial, was erroneous.

WRIT of error to the circuit court for the district of Maryland.
The case is very well stated in the opinion.

Mr. Hamilton and *Mr. Cutting*, for plaintiff in error.

Mr. Brent and *Mr. May*, for defendant.

[* 402] *Mr. Justice NELSON delivered the opinion of the court.

This is a writ of error to the circuit court of the United States for the district of Maryland.

The suit was brought by the plaintiff below upon a policy of insurance covering a quantity of coffee laden or to be laden on board the "good vessel or vessels" from Rio de Janeiro to any port in the United States, "*to add an additional premium, if by vessels lower than A 2, or by foreign vessels.*"

The policy contained the following clause in respect to [* 403] *premiums: "Having been paid the consideration for this insurance by the assured, or his assigns, at and after the rate of one and one half per cent., the *premiums on risks to be fixed at the time of indorsement, and such clauses to apply as the company may insert, as the risks are successively reported.*" The policy bears date 27th July, 1855. The company subscribed at the execution \$22,500 as the amount insured.

On the 30th July, 1855, the policy was altered by agreement of parties by striking out the words, "vessels not rating lower than A 2," as it originally stood, and inserting the words now in the instrument, namely, "*an additional premium, if by vessels lower than A 2, or by foreign vessels.*"

On the 4th January, 1856, the company subscribed an addi-

tional sum of \$15,000, and on the 19th April following the sum of \$25,000.

Premium notes were given at the time the different sums were subscribed, at the rate of premium mentioned in the body of the policy.

The agent of the company at Baltimore, who negotiated this insurance, the defendants being a New York company, states that when applications are made to enter risks on running policies, they are indorsed at once by him, and the report of such indorsement transmitted to the company in New York, which names the premium, and this is communicated to the assured; that the premiums specified in the body of the policies are nominal, and the true premiums to be charged are fixed by increasing or reducing the nominal premiums when the risks are reported; and that the nominal premiums taken on the delivery of a running policy are returned, if no risks are reported.

In the latter part of August, 1856, the plaintiff applied to the agent at Baltimore for an indorsement on the policy of the coffee in question, laden or to be laden on board a vessel called the Mary W., from Rio de Janeiro to New Orleans, which application was communicated to the company, in order that they might fix the premium. The company at first declined to acknowledge the vessel as coming within the description in the policy, on account of her alleged inferior character *and unfitness for the [*404] voyage; but the plaintiff insisting upon the seaworthiness of the vessel, and his right to the insurance within the terms of the policy, the company fixed the premium at ten per cent., subject to the conditions of the policy, or two and one half per cent., as against a total loss. This rate of premium the plaintiff refused to pay.

The coffee was shipped on the Mary W. at Rio de Janeiro for New Orleans, on the 12th July, 1856, at which period she started on her voyage, and was lost on the 29th of the month upon rocks, the master being some seventy miles out of his reckoning at the time.

Evidence was given on the trial, on the part of the company, tending to prove that the Mary W. was rated below A 2, and even that she was unfit for a sea voyage, being originally intended, when built, in 1846, as a coasting vessel, and prayed the court to instruct the jury, that if they find from the evidence the vessel, at the time of the application for the indorsement of her cargo upon the policy, was rated in the office of the company and other offices of the underwriters in New York lower than A 2, and being so rated, the

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company offered to make the indorsement at the premium fixed by them, and that on the premium being communicated to the plaintiff, he refused to pay it or assent thereto, then he is not entitled to recover, which prayer was refused; and the court thereupon instructed the jury, substantially, that the plaintiff was entitled to recover for the loss, so far as the rate of premium was concerned, upon deducting such additional premium to the one and one half per cent., as in the opinion of underwriters may be deemed adequate to the increased risk of the coffee shipped in a vessel rating below A 2.

The jury rendered a verdict for the plaintiff.

The material question presented in the case is, whether or not, the company were under a contract, within any of the terms and conditions of the policy, to insure this particular cargo of coffee on board of the vessel *Mary W.* at the time the loss occurred; for, unless the contract is found there, none existed between the parties, as it is admitted none was entered into at the time

[*405] the vessel was reported and the risk declared. *The

plaintiff has assumed the affirmative of this question, and insists that the company was bound by the terms of the policy to cover the coffee from the time it was laden on board the vessel at Rio as soon as the risk was declared, and this whether the vessel rated below A 2 or not. This is necessarily the result of the position claimed, as it denies to the company the right to fix an additional premium, even if it should happen that the vessel rated below A 2; that then, or in that event, it is contended, the additional premium becomes a question of mutual adjustment between the parties, and if they disagree, to be determined by the courts. On the part of the company, it is insisted that, according to the special provisions in the policy, in case the vessel reported rates below A 2, the contract is inchoate and incomplete until the payment or security by the assured of the additional premium to be fixed at the time by the company.

The contract of insurance in this case arises out of an open or running policy, which enables the merchant to insure his goods shipped at a distant port when it is impossible for him to be advised of the particular ship upon which the goods are laden, and therefore cannot name it in the policy.

A relaxation in this respect has been permitted by the laws and practice of commercial countries; and the party effecting the insurance is allowed to insure the cargo "on board ship or ships," on condition of declaring the ship upon the policy and giving notice to the underwriter as soon as known, and if possible before

the loss on board of which the goods have been laden. The underwriter, who consents to insure upon policies of this description, of course, has no opportunity to inquire into the character or condition of the vessel, and agrees that the policy shall attach, if she be seaworthy, however low may be her relative capacity to perform the voyage; and for the additional risks he may thus incur, he finds his compensation in an increase of the premium. A higher premium is always demanded where the vessels to which the insurance relates are not known.

The ship, indeed, must be seaworthy, or the policy will not attach; but the degrees of seaworthiness or of the capacity of *a ship to perform a given voyage are exceedingly various; [* 406] and it is well known that the rates of premium are varied by the underwriters according to the different estimate they form of the character and qualities of the vessels to which they relate.

In the case of an insurance of goods shipped from and to port or ports designated, or on a voyage particularly specified, the ship to be afterwards declared, and the rate of premium to be paid is ascertained, and inserted in the body of the policy at its execution, the contract becomes complete, and the policy attaches upon the goods from the time they are laden on board the vessel, as soon as the ship is declared or reported, provided the shipment comes within the description in the policy. But until the declaration is made by the assured, it is inchoate and incomplete; and, if not made at all, the risk is regarded as not having commenced, and the assured is entitled to a return of his premium.

The principles of law and rules of construction governing policies of this description appear to be well settled, as may be seen by a reference to the authorities collected in the text-writers. (1 Arnould, ch. 7, sec. 2, pp. 174-179, Perkins's ed.; 1 Phillips, ch. 5, sec. 2, pp. 174-177; 2 Parsons, ch. 1, sec. 2, pp. 34, 35, and ch. 6, pp. 198, 199; 3 Kent's C. p. 256; Hurlst. and Normand R. 2 Exch. p. 549; *Entwisle v. Ellis*, 1857; 4 Taunton, 329; *Langhorn v. Cologan*, 6 Gray, 214; *E. Carver Co. v. Manf. Ins. Co.*

But the policy before us is materially different from the class of open or running policies adopted in England and upon the continent at an early day, and which appear to be generally, if not universally in use at the present time. Instead of determining the amount of premium, and inserting it in the policy at the time of its execution upon the shipments to be afterwards declared, in the case of the policies we have been considering, the parties here agree, that in respect to a certain class of vessels those rating lower than A 2, the premiums on the

fixed at the time they are declared or reported; when thus fixed, and the premium paid or secured, the policy attaches upon the goods from the time they are laden on board the vessel. [* 407] The mere declaration of the * ship on board of, which the goods are laden is not sufficient to complete the contract, as something more is to be done by the assured to bring the subject within the special stipulations in the policy: he must pay or secure the additional premium which the underwriter has reserved the right to fix, at the time of the declaration of the risk.

The premiums specified in the body of the policy are nominal; and the true premiums to be charged are fixed by increasing or reducing the nominal premiums when the risks are reported. This, it was proved, was the established custom of this company, and of which the assured is chargeable with notice. Indeed, this custom appears to have been acted upon in connection with this policy, and with the dealings of the parties under it.

On the 13th August is indorsed on it: Brig Windward, from Rio de Janeiro to Baltimore—value of shipment \$4,750, at $1\frac{1}{2}$ per cent. premium; and on the 20th November: Brig T. Walters, from same place to Philadelphia—value of shipment \$2,375, at $1\frac{1}{2}$ per cent. premium. The premiums for insurance of these two shipments are $\frac{1}{4}$ per cent. less than the rate in the body of the policy.

We have said, that where the vessels to which the insurance relates are not known to the underwriter, a higher premium is always demanded, as he has no opportunity to inquire into the character or capacity of the vessel for the voyage; which information is readily accessible where the ship is known, by reference to the book of the register of vessels kept by the underwriters, in which the name, master, rate, and present condition, are entered.

Now, the change made in this policy, and in others of the class, in the time of fixing the premium, from that of the execution of the policy to the time when the risk is reported, places the underwriters, in respect to fixing the premiums, on the footing of insurance of goods to be shipped on board a vessel named, the underwriters possessing all the information possessed in that case, in respect to the character of the vessel. As the effect, therefore, of

this change in the terms of the policy is to reduce the rate [* 408] of premium, it is as beneficial to * the assured as to the underwriter—which, doubtless, led to his assent to this mode of insurance. It is true, that in respect to vessels to be afterwards declared, and the premiums on the risks to be fixed at the time declared or reported, the parties stand on the footing of orig-

inal contractors, the underwriter having the right to fix the premium, and the applicant the right to assent or not, as he sees fit; and, undoubtedly, mutual confidence must exist, in order to the successful working of the system. On the one side, the underwriter might be unreasonable in the amount of the premium claimed; and on the other, the applicant, who is presumed to have the earliest advices of the ship on which his goods are laden, might conceal her condition when reported, and impose upon the underwriter. Injustice might be practiced in this way by both parties, if this mode of dealing with each other may be assumed.

But this would hardly be just as to either party, and especially when the interest of both is concerned to deal justly and honorably with each other. The business of the underwriter depends essentially upon the good faith with which he deals with his customers; and this motive, as well as the great competition that exists in the business, may be well relied on to prevent any unreasonable advantage. But, at worst, the applicant is not bound to pay the premium, if unreasonable, and may at once be insured in any other office, and claim a return of premium, if any, advanced. The evidence in the present case furnishes no ground for apprehension, as the premium charged was not unreasonable, but the contrary.

But, be the argument ever so strong in respect to the opportunities to deal unjustly with each other, it is quite clear, upon the fair if not necessary construction of the terms of the policy, both parties have agreed to submit to them, for the sake of the better means furnished to ascertain the true character of the risks, and thus reduce the rate of premium below that which was charged under the old system, where it was fixed in the absence of knowledge on the subject; and the period of time these policies with this change of the terms has been in use, for aught that appears, without complaint or *dissatisfaction, affords [* 409] evidence that all apprehensions of unfair dealing are imaginary.

We have said that, according to the true construction of the terms of this policy, where the vessel declared or reported by the assured was rated below A 2, the company had reserved the right to fix at the time the additional premium; and unless assented to by the assured, and the premium paid or secured, the contract of insurance, in respect to the particular shipment, did not become complete or binding. The court below held the contrary, the instruction to the jury maintaining that the contract was complete and binding as soon as the vessel was reported; and that, if the parties could not agree as to the additional premium, the question

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was one for the courts to settle; thus placing this policy upon the footing of those where the full premium was fixed, and paid or secured, at the time of the execution, and in which no special provisions concerning the premium are inserted.

These special clauses are very explicit, and are inserted in this policy for the benefit of the company. We think, independently of the usage and practice of the company under these policies, the import of the language used cannot well be mistaken.

The right is expressly reserved to charge an additional premium upon all vessels reported rating below A 2; and, again, the premiums on risks are to be fixed at the time of indorsement—that is, when the vessels are reported to be noted on the policy. If the construction rested alone upon the right to add additional premiums upon a given rate of vessels, there might be some ground for the argument that the time for fixing them was open; and if the parties could not agree, the law must determine the question. But when the parties themselves stipulated, not only that in the particular case additional premium shall be charged, but that it shall be fixed at the time the risk is made known, there would seem to be no room for doubt or dispute in the matter. In the present case, there is also the additional special provision, namely, “and such clauses to apply as the company may insert as the risks are successively reported,” thus providing for any unforeseen [* 410] *or extraordinary risks that might be claimed under the policy.

Even if an arbitrator had been agreed upon to fix the additional premium, and he had refused, the contract would have been at an end, as the courts could not appoint one. (3 Mer. R. p. 507, *Wilks v. Davis*; 14 Ves. 400, *Milner v. Geary*; Code Napoleon, 1591, 1592; 1 Troplong de vente, Nos. 146, 160.) And certainly they could not fix the premium in this case, on the disagreement of the parties, without assuming the right to make a contract for them. The premiums were to be settled when the risks were reported, not at any other period.

In the case of policies on goods “in ship or ships,” to be afterwards declared, and where the full premium is paid or secured at the execution, the policy, even in that case, is a mere outline of the contract, to be completed on making the declaration; but if not made within the terms of the policy, the contract is at an end as respects the particular shipment.

In *Entwisle v. Ellis*, (2 Hurlst. and Norm. Exch. R. P. 549, 556, 1857,) Channell, B., observed, speaking of a policy of this description, at the time of the making of the policy; certain particulars

were agreed upon—others were left to be settled. The policy was to be on rice, to be warranted free from particular average, to be sent "in ship or ships." Something more was wanting to make a binding contract. The parties can only fill up such particulars as are left in blank so as to be consistent with the policy.

Applying this principle to the policy in the present case regarding the special clauses therein, something more is required to make a binding contract than the declaration of a ship rating lower than A 2 to bring the subject within the policy; the additional premium fixed by the company was to be paid or secured.

We have found very few cases in the books upon the peculiar class of policies before us, and no mention of them in the text-writers on the subject of insurance. The case bearing more directly than any other upon the point in question is *Dounville v. The Sun Insurance Company*. (12 Louis. Ann. R. p. 259.)

*The contract of insurance there was in an open or run- [*411] ning policy of the class in which the full premium was paid or secured at the execution. But a modification was afterwards made, by which "it was agreed that this policy shall cover merchandise to the address of the assured from European ports to New Orleans, *via* Boston or New York, *subject to additional premium as per tariff*."

The court held that by the terms of the policy, the party desiring to be insured upon any particular shipment of merchandise was bound to present to the company an invoice of the goods, (this had been provided for in the policy,) and pay or secure the premium; that the party was not bound to report any shipment except at his election, nor could the company demand premium on the same, unless presented for insurance; and that, on a policy of the class before the court, there must necessarily exist as many contracts of insurance as there are indorsements on the policy of separate shipments.

We have examined this case more at large, from the novelty of the questions involved, as they do not seem to have been the subject of consideration by the courts of text-writers, than from any difficulty we have felt in the view to be taken of them; and from the examination we have given to the peculiar features of the policy, we entertain no doubt but that the changes made, and which have been particularly referred to, will be found in practice beneficial both to the insured and insurer.

The only defect, perhaps, existing, is the want of a provision for the case, which may happen, where the declaration or report of the ship is not made until the loss is known—that is, where the ship

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and the loss are reported together. According to the old form of the policy, the full premium being ascertained and fixed at the date of it, it is well settled that, though the declaration is not made till the loss is known, if made with due diligence after advices of the ship, the underwriter is liable. There may be some difficulty in applying that rule to the class of policies before us. It was rejected in the case of *Dounville v. The Sun Insurance Company* above referred to.

[*412] * Upon the whole, after the best consideration we have been able to give to the case, we are satisfied the ruling of the court below was erroneous, and the judgment must be reversed, and a *venire de novo*.

Mr. Justice CLIFFORD dissented. For his dissenting opinion, see the succeeding case of the Sun Mutual Insurance Company against Wright—a case similar to the present one.

THE SUN MUTUAL INSURANCE COMPANY, Plaintiff in Error, v. JOHN S. WRIGHT, use of Maxwell, Wright & Co.

23 H. 412.

MARINE INSURANCE—EFFECT OF CERTAIN CLAUSE IN OPEN POLICY.

1. The same principle affirmed in regard to special clauses as in the last case.
2. Certain correspondence between the parties and acts of the agent, which were insisted on as a waiver of the right of the company to fix the premium, held not to have that effect.

WRIT of error to the circuit court for the district of Maryland.

The case is the same as the previous one, except as an indorsement on the policy by the agent, and certain correspondence stated in the opinion.

Mr. Cutting, for plaintiff in error.

Mr. May and *Mr. Brent*, for defendant.

Mr. Justice NELSON delivered the opinion of the court.

This is a writ of error to the circuit court of the United States for the district of Maryland.

The suit below was upon a policy of insurance brought by the plaintiff to recover a loss upon coffee on board the vessel *Mary W.*

on a voyage from Rio de Janeiro to a port in the United States. The questions involved are substantially the same as have been examined in the case of the same plaintiff

against the Oriental Mutual Insurance Company, and the decision in that governs the present one.

It was insisted in this case, on the part of the plaintiff below, that the company had waived the question as to the premium on the declaration or report of the Mary W., as it was bound by the act of the agent in making the indorsement on the policy, who added simply the words, "not to attach if the vessel proved unseaworthy."

The company were advised, by a letter of their agent, dated August 23, 1856, of the application of the plaintiff to have the coffee in question on the Mary W. entered on his policy; and on the 25th of the month they answered, directing the agent to inform the plaintiff of the facts the company had previously communicated to R. C. Wright, a brother, in relation to the vessel, and that they regarded her an entirely unfit vessel for a cargo of coffee, and should not consider the policy as attaching to the cargo.

The correspondence with R. C. Wright on the subject was under date of the 14th August, same year, and which related to a different shipment of coffee on the same vessel.

The plaintiff, notwithstanding the objections of the company, insisted upon his right to have the coffee covered by the policy, and so advised the agent, who communicated the information to the company. On the 26th of the month, they still insisting that the vessel was unfit for such a cargo, instructed the agent to inform the plaintiff that if he claimed the property to be covered by the policy, he must consider it subject to the risk of the policy not attaching from the unseaworthiness of the vessel. Upon this, the agent entered the coffee upon the policy, with the words "not to attach if vessel be proved unseaworthy," and so advised the company. They, on receiving this advice, immediately informed the agent that the indorsement was a practical nullity, and directed him to inform the plaintiff that they conceded his right to be covered by the policy, and that they had no other remedy but to name a premium commensurate to the risk, and fixed the premium at ten per cent., subject to the conditions of the policy, or two * and a half per cent. upon a total loss. In answer [*414] to this, the plaintiff objected to the premium, insisting, if the Mary W. rated below A 2, the company were only entitled to an equitable rate of premium; and if they and he could not agree, it was a proper case for a reference.

The company, in answer to this, respond, that they had reserved the right in the policy to fix the premium in case of vessels rating below A 2, and that they could not consent to its determi-

nation by a third person. The plaintiff again denied the right of the company to fix the premium, and thus the correspondence terminated.

It is quite apparent that there was no waiver of this right of fixing the premium on the part of the company, nor was it claimed or suggested in the communications between the parties at the time.

Judgment reversed, and a *venire de novo* awarded.

Mr. Justice CLIFFORD dissenting.

I dissent from the opinion of the court in this case; and inasmuch as the question presented is one of considerable importance, I think it proper to state the reasons of my dissent.

John S. Wright, the present defendant, sued the plaintiffs in error on a policy of insurance, to recover for a total loss of a cargo of coffee, shipped from Rio de Janeiro to New Orleans on the schooner Mary W. As appears by the bill of lading, the goods were shipped at the port of departure as early as the twelfth day of July, 1856, and the vessel sailed for New Orleans on the same day. She had stormy weather after her departure; and on the twenty-ninth day of August following she was wrecked upon the rocks and all her cargo was lost. Notice of the shipment was received by the plaintiff on the twenty-third day of August, 1856, and on that day he notified the agent of the defendants, residing in Baltimore, of the same, and requested him to enter under his policy the cargo of the vessel, which consisted of coffee, valued at eighteen dollars per bag.

By the terms of the policy the plaintiff was insured, "on account of whom it may concern—loss payable to them, [* 415] * lost or not lost—at and from Rio de Janeiro to a port of the United States, on one half of five thousand bags of coffee, each two hundred bags in running marks and numbers, in order of invoice, subject to separate average, upon all kinds of lawful goods and merchandise laden on board of the good vessel or vessels, beginning the adventure upon the said goods and merchandises from and immediately following the loading thereof on board the said vessel at the place of shipment as aforesaid, and so shall continue until the said goods and merchandise shall be safely landed at the place of destination, as aforesaid."

Another clause was, that "the said goods and merchandise hereby insured are valued at eighteen dollars per bag, as interest may appear."

Payment of the consideration by the assured is expressly acknowl-

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edged by the terms of the policy, at and after the rate of one and one-half per cent.—to return one-fourth per cent., if direct to an Atlantic port; to add an additional premium, if by vessels rating lower than A 2, or by foreign vessels, subject to such addition or deduction as shall make the premiums *conform to the established rate at the time the return is made to the company.*

Some reference to the correspondence between the parties becomes necessary, in order that the true nature of the controversy may be fully and clearly understood.

Defendants are a corporation, doing business in the city of New York; but they have an authorized agent in Baltimore, where the defendant resides. Their agent informed them by letter, under date of the twenty-third of August, 1856, that the plaintiff on that day had requested him to enter this cargo under his policy; and in the same letter stated the amount of the goods and the name of the vessel. To that letter the defendants replied three days afterwards, saying that they considered the vessel entirely unfit for a cargo of coffee, and should not consider their policy as attaching thereto.

That information was communicated to the plaintiff by the agent on the following day; but the plaintiff insisted that the goods were covered by the policy; and on the same day the *defendants were informed by their agent that the [*416] plaintiff did so insist. They were also furnished by their agent at the same time with a letter from the plaintiff, giving his reasons for insisting that the cargo should be entered under the policy. In that letter he stated that the sole object of open or running policies would be defeated, if the underwriters were at liberty to decline any risk that might arise under them; and repeated, that he considered the defendants bound, by the spirit as well as the letter of their policy, to cover the goods at risk on this vessel.

Each party was thus fully possessed of the views of the other, and of all the circumstances of the case. Neither appears to have entertained a doubt as to the validity of the contract, and the only matter in dispute between them was the fitness of the vessel for such a cargo. But they had further correspondence, which it is important to notice, in order to understand the real nature of the controversy between the parties. Following the order of events, the next letter is the reply of the defendants to their agent, which is dated the twenty-sixth day of August, 1856, three days before the loss, and more than forty days after the vessel had departed on her voyage. In that letter they say, after acknowledging the

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receipt of the one to which it was a reply, that, with regard to the case of the schooner under the policy of the plaintiff, they can only repeat their belief that she is an unfit vessel for such a cargo, which makes her an unseaworthy risk, and request their agent to say to the plaintiffs, that if he deems the property covered by the policy, *he must so consider it subject to the risk of the policy not attaching from the unseaworthiness of the vessel.*

Pursuant to that letter, the agent of the defendants two days afterwards wrote to the plaintiff, that the president of the company "has requested me to say to you, that he will cover for the schooner Mary W., but you must consider it subject to the risk of the policy not attaching from the unseaworthiness of the vessel," and made the endorsement on the policy as follows, dating it on the preceding day:

"August 27, 1856. Schooner Mary W., Rio de Janeiro [* 417] to * New Orleans, on $\frac{1}{2}$ cargo, 1,830 bags of coffee, at \$18 per bag—not to attach if vessel be proved unseaworthy—\$16,470."

When that indorsement was made, in my judgment the contract became complete, leaving the additional premium to be equitably adjusted between the parties, according to established rate of vessels rating under A 2; or, in case of dispute, to be settled, like any other controversies, by the judicial tribunals. (*E. Carver Co. v. Manf. Ins. Co.*, 6 Gray, 214.)

On the following day the agent informed the defendants that he had made the indorsement. To that letter they replied on the twenty-ninth day of the same month, saying, in effect, that the condition inserted in the indorsement was practically a nullity; and as a reason for that conclusion, they add, that no risk attaches if the vessel is proven to be unseaworthy, but the difficulty is, so to prove them. After some other remarks, which it is not important to notice, they go on to say, that no other remedy remains except to name a premium commensurate with the risk, which they therein insist it is their right to do. Accordingly, they fix ten per cent., subject to the conditions of the policy, or two and a half per cent. against a total loss, and direct their agent to notify the plaintiff of their action in the premises, that he may determine on which rate he wanted the risk entered. That notice was given to the plaintiff by the agent on the second day of September following. He objected to the rates named as exorbitant, but admitted the right of the company to an equitable rate, and insisted that the cargo was covered by the policy. His views were communicated by the agent to the defendants on the third day of September, 1856, and on the following day they struck the risk from their books.

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Evidence was introduced by the plaintiff that the premiums specified in the body of running policies are nominal, and that the true premiums to be charged are fixed by increasing or reducing the nominal premium when the risks are reported. Premium notes were given by the plaintiff in this case at the policy rate of one and one-half per cent., and were paid by him to the defendants at their maturity, long before the loss in this case. Sums paid for premiums on running policies, *according to the [* 418] custom of this company, are returned if no risks are reported, but with a deduction of half per cent., which is retained by the company for their services. According to the testimony of the agent, he had no power to bind the company from the time of the application for insurance until the answer thereto was received from the company.

On this state of the case, the presiding justice instructed the jury as follows: "If the jury shall find from the evidence that the defendants executed the policy of the 27th of July, 1855, and received from the plaintiff the premium therein mentioned, and that their duly-authorized agent in this city made the indorsements on the policy which have been offered in evidence; and shall further find that 1,830 bags of coffee belonging to the plaintiff were shipped on the 12th day of July, 1856, at Rio, on board of the schooner Mary W., to be carried to New Orleans, and that when the schooner left Rio she was seaworthy and in good condition; and shall further find that the vessel and cargo were subsequently on the voyage totally lost by one of the perils insured against, and that the schooner was rated lower in New York than A 2, then the plaintiff is entitled to recover for one-half the value of the coffee so lost, at \$18 per bag, *less such additional premium* beyond the $1\frac{1}{2}$ per cent., as in the opinion of underwriters may be deemed adequate for the increased risk to a cargo of coffee shipped in a vessel rating below A 2, with interest from thirty days after such time as the jury may find the defendants were furnished by plaintiff with the preliminary proofs of his loss."

Under the instructions of the court, the jury returned their verdict for the plaintiff, and the defendants excepted. That instruction, so far as it is necessary to consider it at the present time, affirms that, by the true construction of the policy, the contract between the parties under the circumstances of this case, as disclosed in the evidence, was complete when the shipment of the goods was reported by the plaintiff, and the indorsement was made upon the policy by the authorized agent of the defendants. In that view of the case I entirely concur. When the report was for-

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warded by the agent, the only objection made to the risk [* 419] was, that the vessel was *unsuitable, or that she was unseaworthy. That objection was repealed, and finally the plaintiff was told, that if he insisted upon the indorsement, it would only be made upon the condition that the policy should not attach if it turned out that the objection of the defendants was well founded. He accepted the condition, and the indorsement was so made. After the indorsement was made, it was too late for the defendants to reconsider the position they had voluntarily assumed. (*E. Carver Co. v. Manf. Ins. Co.*, 6 Gray, 214.)

Suppose they had a right, as a condition precedent, to demand the payment of the additional premium before making the indorsement; they did not insist upon the right, but voluntarily waived it. They had already received the policy rate of one and one half per cent., and to the present time have neglected to refund the same. Prepayment of the policy rate was a sufficient consideration to uphold the contract; and certainly it will not be denied that they might waive the right to claim prepayment of whatever might be due to them for the additional premium contemplated by the policy. But their right to demand the additional premium as a condition precedent to the indorsement cannot be admitted. Such a construction would defeat the policy, and therefore must be rejected, unless the language of the instrument is imperative to that effect. 1 Phil. Ins., sec. 438; and *Kewley v. Ryan*, 2 H. Black, 343. Policy rate is not the actual rate of adjustment between the parties in any case under this instrument, unless, perchance, it happens to be the established rate at the time the return is made to the company. *Crawford v. Hunter*, 8 Term, 16, note.

Addition or deduction from policy rate is to be made in all cases so as to make the sum paid and received conform to the established rate. Something, therefore, remains to be done in respect to every risk, irrespective of the character of the vessel. In case the shipment is by a vessel rating under A 2, or by a foreign vessel, an additional premium may be added; but there is no stipulation in the instrument that it shall be paid in advance of the indorsement; and there is nothing in the language of the instrument [* 420] from which to infer that such was * the intention of the parties. That inference is wholly gratuitous, and, in my judgment, unfounded. When adjusted, the sum to be paid must conform to the established rate at the time the return was made to the company.

If the parties cannot agree what the established rate was at that time, like other matters of controversy, it must be settled by the

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judicial tribunals. *Harman v. Kenyston*, 3 Camp. 150; 1 Arnold on Ins. 175, 177; *Smith's Mer. L.* 208; *U. S. v. Wilkins*, 6 Whea. p. 144. Unless this be the true construction of the policy, then it is a delusion which ought to be shunned by every business man. Loss often occurs before the notice of the shipment. The insured cannot adjust the additional premium until he knows by what vessel the shipment has been made, so that, if it be true that the contract is incomplete until the additional premium is adjusted and paid, then open or running policies for the insurance of goods from distant ports are valueless. They are worse than valueless, as generally understood, because they have the effect to delude and deceive.

For these reasons, I am of the opinion that the judgment of the circuit court ought to be affirmed.

CHARLES BLIVEN and EDWARD B. MEAD, Plaintiffs in Error, v. THE
NEW ENGLAND SCREW COMPANY

23 H. 420.

USAGE AS AFFECTING CONTRACT.

The screw company being the sole manufacturers of wooden screws, were unable to supply the demands of all their customers as fast as needed. They adopted the system of apportioning their articles as fast as produced among their customers, having respect to the date of their orders. Held, that this usage being well known to plaintiffs who had ordered such goods, proof of the usage and of their following it in filling plaintiff's orders was admissible as a defense in a suit for failing to deliver in time.

WRIT of error to the circuit court for the southern district of New York. The case is elaborately stated in the opinion.

Mr. Wright, for plaintiffs in error.

Mr. Stoughton and *Mr. Jenckes*, for defendants.

* Mr. Justice CLIFFORD delivered the opinion of the court. [* 424]

* This is a writ of error to the circuit court of the United [* 425]
States for the southern district of New York.

According to the transcript, the suit was originally instituted in the supreme court of the State of New York by the present plaintiffs, who were citizens of that State; but was afterwards regularly removed, under the twelfth section of the judiciary act, into the circuit court of the United States, because the corporation defendants were citizens of the State of Rhode Island.

It was an action of *assumpsit*, brought to recover damages for

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the supposed breach of six separate and distinct contracts, in which the defendants, as was alleged in the declaration, stipulated to deliver to the plaintiffs, pursuant to their written orders given at sundry times, certain quantities of screws, unusually denominated wood screws, of various sizes and descriptions, as were therein specified. Readiness to perform on the part of the plaintiffs, and neglect and refusal on the part of the defendants to deliver the goods, after seasonable demand, constituted the foundation of the respective claims for damages, as alleged in the declaration. Those claims are set forth in eighteen special counts, to which are also added the common counts, as in actions of *indebitatus assumpsit*. Of the several contracts, the first is alleged to have been made on the seventh day of October, 1852, and the last on the nineteenth day of April, 1853.

At the May term, 1855, the parties went to trial upon the general issue. To prove the several agreements, the plaintiffs relied on certain correspondence which had taken place between the parties upon this subject, consisting of letters written by the plaintiffs to the defendants, in the nature of orders or requests for the goods, and the replies thereto written by the defendants.

As appeared by the proofs, the plaintiffs were merchants, engaged in buying and selling hardware, and the defendants were engaged in manufacturing the description of goods specified in the declaration. They were in point of fact the sole manufacturers of the article in the United States, and were constantly receiving orders for the article from their customers *faster than they could fill them, and for larger quantities than they were able to produce.

Orders had been given for this article by the plaintiffs prior to the date of this controversy; but the evidence in the case does not show when their dealings commenced. Six orders of like import were given by the plaintiffs, during the fall of 1852 and the early part of the year 1853, for large quantities of the article, of various sizes and description. This suit was brought to recover damages for not filling those orders, which, it is insisted by the plaintiffs, had been accepted without any reservation. Some of them had been filled in part only, and others had not been filled for any amount, when the suit was commenced.

It was denied by the defendants that the orders had been accepted without condition. On the contrary, they insisted that the plaintiffs well knew that the supply was greatly less than the demand, and that the orders were only accepted to be filled in their turn, as the defendants were able to produce the article.

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To support the first three counts of the declaration, the plaintiffs, among other things not necessary to be noticed, introduced three letters—two from themselves to the defendants, and the reply of the defendants to the same. Reference will only be made to such brief portions of the correspondence as appear to be essential to a proper understanding of the legal questions presented in the bill of exceptions.

Dissatisfaction was first expressed by the plaintiffs in their letter dated on the 30th day of September, 1852. In that communication, they simply refer to the long delay that has occurred in filling their orders, and furnish a memorandum of the amount and sizes of the article claimed by them to be due and not delivered, under their order of the 29th of June of the same year. They state, that after three months' delay, only about one and one-fourth per cent. of the same has been filled, and that they have not a gross of screws under an inch in their stock. Request was also made in the same communication that the plaintiffs would send at once all they could of the article, and the balance of the same as soon thereafter as *it was possible. That request was, in [* 427] effect, repeated in another letter, written on the 5th day of October, 1852; and on the 17th day of the same month, the defendants replied, saying that the order referred to would be taken up at the earliest possible day.

No further correspondence applicable to the first three counts was introduced by the plaintiffs in the opening of the case.

They then gave evidence to prove the second agreement, as alleged in the fourth, fifth, and sixth counts of the declaration. For that purpose, they introduced two letters—one from themselves to the defendants, dated on the 15th day of October, 1852; and the other from the defendants to them in reply, dated on the following day. Their letter to the defendants contained an order for three thousand seven hundred and fifty gross of screws, half to be delivered by the 15th day of March then next, and the other half a month later, subject to the regular discount at the time of delivery. That order was given thus early, as the plaintiffs stated, with a view to avoid thereafter the inconvenience they had suffered from not having their orders filled, and because they anticipated a short supply of the article the next season. In the same letter, they informed the defendants that it was given as an additional order, and requested that those previously sent might be filled without further delay.

To that communication the defendants replied, acknowledging its receipt, and saying that the order had been entered in their

books, to be executed at the times named. They also referred to the previous orders, saying they would do what they could to fill them before navigation closed on the canals; but added, that they could only take them up in course, as they had a great many orders from other parties in the same condition.

Evidence was then offered by the plaintiffs to prove the third agreement, as alleged in the seventh, eighth, and ninth counts of the declaration. To support those counts, two letters were introduced—one from the plaintiffs to the defendants, dated [* 428] the 4th day of November, 1852; and the reply of * the defendants to the same, which was dated on the sixth day of the same month. By the letter first named, the defendants were furnished with another order of the plaintiffs for an additional quantity of screws, and were requested to place the order in their books, to be filled as fast as possible, at a given rate. Previous orders were also referred to in the same letter, and the plaintiffs complain that they have not been filled in their turn; adding that that they have not a gross of gimlet-point screws in their store, and earnestly requested the defendants to send them a lot by steamboat on the following day. Two days afterwards, the defendants acknowledged the receipt of the order, and informed the plaintiffs that it had been entered in their books, to be taken up in course.

Those letters constitute the only evidence offered by the plaintiffs in the opening to prove the third agreement.

They then gave in evidence another order from themselves to the defendants, to prove the fourth agreement, as alleged in the tenth, eleventh, and twelfth counts of the declaration. It was dated on the 7th day of November, 1852. In the same communication, they stated that they were in great want of a certain description of screws, and expressed the hope that the plaintiffs would send what they could of the article by steamboat without delay, adding: "We have always said, send what you can of our orders as fast as you get a case or two ready, or to that effect." To that letter the defendants replied, under date of the 19th of the same month, saying that the best they could do was to enter the order, to be taken up in course, intimating that perhaps it might be accomplished in about two months.

Similar evidence was given to prove both the fifth and the sixth agreements, as alleged in the six remaining counts of the declaration. Two orders given by the plaintiffs were introduced for that purpose. One was dated on the 10th day of February, 1853, and the other on the 19th day of April, of the same year. They were each for twenty thousand gross of screws; and the defendants were

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requested to enter the orders in their books, to be filled as soon as possible after they should have completed those previously given. Separate *answers were given by the [*429] defendants to each of these orders, to the effect that they would be entered in the books of the defendants, to be taken up in course or in their turn, and be filled when they reached them, as far as they should be able to do so, consistently with their obligations to other customers.

No part of the two orders last named had been filled when this suit was commenced. Demand was made of the defendants, on the 30th day of September, 1853, for the delivery of such proportions of the several orders as had not been previously filled. At the same time, the plaintiffs rendered their account, and tendered to the defendants their promissory notes for the respective sums which would become due to the defendants on making such delivery.

Such was the substance and effect of the evidence introduced by the plaintiffs in the opening, so far as it is necessary to consider it at the present time. Many other matters were stated in the correspondence; but as they are not material to this investigation, they are omitted.

To maintain the issue on their part, the defendants, among other things, introduced a letter from the plaintiffs, addressed to them, dated on the 3d day of September, 1852, in which inquiry was made of the defendants why they did not fill the orders given by the plaintiffs. They also stated in the same letter that not a week passed without their hearing of the defendants taking and executing orders from other customers; but admitted in effect that they had long since been given to understand the rule of business adopted by the defendants in that behalf, and only complained that precedence was given to the first orders from other customers.

Testimony was also introduced by the defendants, that they had some five hundred customers, and that the orders of the plaintiffs had been taken up and filled in proportion to the orders given by other customers, as the defendants manufactured the article and were able to deliver the goods. To that testimony the plaintiffs objected; but the court overruled the objection, and it was admitted, and the plaintiffs excepted.

All of the orders given by the plaintiffs, except the two last named, were filled in part, and, as the defendants proved, in *due proportions to the orders of other customers, as [*430] the article was produced. They also proved, that when orders were given and accepted without the price of the article being agreed, it was their custom, and according to the usage of their

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business, to charge at the rates ruling at the time of the delivery; and if during the interval the discount from fixed rates had increased, the purchaser had the benefit of the allowance; but if prices had risen, and the discount was less, then the purchaser paid according to the increased price. To this testimony, as to the usage of the defendants' business, the plaintiffs objected, but the court overruled the objection; and the testimony having been admitted, the plaintiffs excepted. That practice, however, was not applicable to customers who were not duly notified of the usage, but all such had their orders filled at former rates. Orders from other customers were received by the defendants throughout the period of these transactions, but they refused to accept orders from new parties.

Proof was also offered by the defendants, tending to show that the profit to the manufacturer was less upon the small sizes of the article than upon the large, and it was admitted by their counsel that the market price of the goods advanced after the orders of the plaintiffs were given. Much additional testimony was introduced on the one side and the other, to which it is not necessary to refer, for the reason that it presents no question for the decision of this court. On this state of facts, the presiding justice instructed the jury to the effect that the several contracts for the sale of the goods by the defendants to the plaintiffs were subject to the custom of the defendants to fill the same in part only, and that the plaintiffs, from having been dealers with the defendants, and from the correspondence between them, were chargeable with notice of the defendants' custom to fill their contracts only in the order they were accepted, and in proportion with each other, and, not in full, according to the strict terms thereof. Under the rulings and instructions of the court, the jury returned their verdict for the defendants, and the plaintiffs excepted to the instructions. Exception was taken to two of the rulings of [* 431] * the court and to each of the instructions to the jury, but they present only one question for decision, and therefore may well be considered together. No evidence of general usage or custom in the ordinary sense of those terms was offered in this case, and no question touching the general rules of law upon that subject is presented for the decision of this court. It may also be safely admitted that the custom of a party to deliver a part of a quantity of goods contracted to be delivered, though invariable, cannot excuse such party from a full compliance with his contract, unless some such custom is known to the other contracting party, and actually enters into and forms a part of the contract. Mere knowledge of

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such a usage would not be sufficient, but it must appear that the custom actually constituted a part of the contract. But when it appears that such custom was well known to the other contracting party as necessarily incident to the business, and actually formed a part of the contract, then it may furnish a legal excuse for the non-delivery of such a proportion of the goods as the general course of the business and the usage of the seller authorize, for the reason that such general usage, being a part of the contract, has the effect to limit and qualify its terms. *Linsley v. Lovely*, 26 Vt. 137. Customary rights and incidents, universally attaching to the subject matter of the contract in the place where it was made, are impliedly annexed to the language and terms of the contract, unless the custom is particularly and expressly excluded. Parol evidence of custom, consequently, is generally admissible to enable the court to arrive at the real meaning of the parties, who are naturally presumed to have contracted in conformity with the known and established usage. But parol evidence of custom and usage is not admitted to contradict or vary express stipulations or provisions restricting or enlarging the exercise and enjoyment of the customary right. Omissions may be supplied, in some cases, by the introduction of the custom, but the custom cannot prevail over or nullify the express provisions and stipulations of the contract. 2 Add. on Con. 970. Proof of usage, says Mr. Greenleaf, is admitted either to interpret the meaning of the language of the contract, or to ascertain the * nature and extent of the contract, in [* 432] the absence of express stipulations, and where the meaning is equivocal or obscure. 1 Greenl. Ev. sec. 292. Its true and appropriate office is to interpret the otherwise indeterminate intention of the parties, and to ascertain the nature and extent of their contracts, arising not from express stipulations, but from mere implications and presumptions, and acts of a doubtful or equivocal character. *The Reeside*, 2 Sum. 564. Nothing can be plainer than the proposition, that the evidence in the case proved that the supply with the defendants was much less than the demand of their customers. To avoid dissatisfaction, therefore, they were obliged to devise some system which would enable them to do equal justice among those who were properly competing for the article. Accordingly, they adopted a rule to accept all such requests, and to enter the list in a book kept for the purpose, and to fill them as far as possible in the order they were received. They had been in business for some time, and that rule had become the custom of their trade, and, as such, was well known to the plaintiffs during all the time of these transactions. Many of their

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orders thus given at short intervals had been expressly accepted to be filled in turn or in course, and the correspondence plainly showed that the plaintiffs well knew what was meant by those terms. Evidence to prove that the orders had been taken up in turn, and filled in proportion to the orders given by other customers, was therefore admissible, in order to show that the defendants had fulfilled their contract, and done no injustice to the plaintiffs; and it is equally clear that evidence to show what had been the usage of the defendants' business was also admissible, because that usage constituted an essential part of the several contracts which were the subjects in controversy. *Renner v. Bank of Columbia*, 9 Wheat. 588. After what has been remarked, one or two additional observations respecting the instructions given to the jury will be sufficient. Written evidence, as a general rule, must be construed by the court, and the first instruction was confined to that purpose. It gives the true exposition of the correspondence, and therefore is not the subject of error. It is insisted by the counsel of [* 433] the * plaintiffs that the second instruction withdrew the evidence of notice from the consideration of the jury.

We think not, and for two reasons. In the first place, it was the proper duty of the court to construe the correspondence, and that of itself was sufficient to justify the charge. But the charge must receive a reasonable interpretation. In effect, the jury were told that the evidence, if true, showed that the plaintiffs had notice of the custom of the defendants in regard to the filling of the orders. It did not withdraw the question as to the credibility of the witnesses from the consideration of the jury, and that was all that could properly be submitted to their determination. In view of all the circumstances, we think the exceptions must be overruled. The judgment of the circuit court is therefore affirmed with costs.

CHARLES BLIVEN and E. B. MEAD, Plaintiffs in Error, v. THE NEW ENGLAND SCREW COMPANY.

23 H. 433.

EVIDENCE—CUSTOM.

Where the plaintiffs in the next preceding case, when sued for the price of the articles actually delivered, set up the failure to deliver the other articles ordered as a set-off or defense to the action, it was held that if the defendants had delivered according to the usage of their business as known to plaintiffs, the non-delivery beyond such usage was a defense to the counter claim.

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WRIT of error to the circuit court for the southern district of New York. The case is sufficiently stated in the opinion.

Mr. Wright, for plaintiffs in error.

Mr. Stoughton and *Mr. Jenckes*, for defendants.

Mr. Justice CLIFFORD delivered the opinion of the court.

This case comes before the court upon a writ of error to the circuit court of the United States for the southern district of * New York. It was an action of *indebitatus assumpsit*, [* 434] brought by the present defendants to recover the amount due them for certain goods sold by them to the plaintiffs in error, who were the original defendants. At the May term, 1855, the parties went to trial upon the general issue. To prove the issue on their part, the plaintiffs introduced a letter from the defendants, dated on the seventeenth of May, 1853, and addressed to the plaintiffs. In that letter the defendants acknowledged the receipt of the plaintiffs' account, but claimed a small deduction for an alleged error. Evidence was then introduced by the plaintiffs, tending to show that account was correct.

Having proved their account, the plaintiffs rested their case.

To maintain the issue on their part, the defendants set up that the goods charged in the account had been delivered to them in pursuance of certain contracts made between the parties, in which the plaintiffs had agreed to sell and deliver to them large quantities of screws usually denominated wood screws, of various sizes and descriptions, but that they had failed to fulfill their contracts. They admitted that a part of the goods had been delivered; but, inasmuch as no one of the contracts had been completed, they insisted that a recovery could not be had for a partial performance.

Their defense was sustained by the same evidence as that introduced by them in the preceding case, and the plaintiffs offered the same evidence in reply as they had in the other case, to make out their defense. Similar exceptions were taken by the defendants to the rulings of the court in admitting their testimony as to the course of business, and the usage of the plaintiffs' trade. After the evidence was closed, the court instructed the jury that the several contracts for the sale and the delivery of the screws by the plaintiffs to the defendants were subject to the custom of the plaintiffs to fill the same in part only. Under that instruction, the jury returned their verdict in favor of the plaintiffs for the amount of the account, together with interest, and the defendants excepted. No question is presented in the bill of exceptions that has not

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already been considered and decided by this court in the preceding case. For the reasons there given, we think the rulings [* 435] and instructions *of the circuit court were correct, and refer to those reasons for the grounds on which the conclusion in this case rests. The judgment of the circuit court is therefore affirmed, with costs.

EDWARD MINTURN, Appellant, v. JAMES B. LARUE and others.

23 H. 435.

CORPORATE POWER TO GRANT EXCLUSIVE FERRY PRIVILEGES.

The charter of the town of Oakland, which gave power to lay out, make, open, widen, regulate, and keep in repair all streets, roads, bridges, ferries, wharves, docks, piers, slips, &c., and to authorize the construction of the same, did not authorize the town to grant an exclusive right of ferry between that town and San Francisco; and the ordinance of the town, so far as it attempts to grant such exclusive right, is void.

APPEAL from the circuit court for the northern district of California. The question is stated in the opinion of the court. It arose on a demurrer to plaintiff's bill to enjoin the defendants from running a vessel between Oakland and San Francisco.

Mr. Johnson, for appellant.

Mr. Stanton, for appellee.

Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from a decree of the circuit court of the United States for the district of California.

The bill was filed by the complainant in the court below to restrain the defendants from running a ferry between the city of San Francisco and the city of Oakland, on the opposite side of the bay, and which, it is claimed, is in violation of the [* 436] *exclusive privileges belonging to him under the authority of law. The authority, as set forth in the bill, is derived from the charter of the town (now city) of Oakland. The 3d section of the charter (passed May 4, 1852) provided that "the board of trustees shall have power to make such by-laws and ordinances as they may deem proper and necessary;" among other things, "to lay out, make, open, widen, regulate, and keep in repair, all streets, roads, bridges, ferries," &c., "wharves, docks, piers, slips," &c., "and to authorize the construction of the same;" "and with a view to facilitate the construction of wharves and other improvements, the lands lying within the limits aforesaid,

(that is, of the corporation,) between high tide and ship channel, are hereby granted and released to said town."

It is admitted, if the authorities of the town of Oakland possessed the power under the charter to grant an exclusive right of ferries between that place and the city of San Francisco, the complainant has become vested with it. The question in the case, therefore, is, whether or not the power was conferred by this 3d section of the charter.

It is a well-settled rule of construction of grants by the legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act or derived therefrom by necessary implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public. This principle has been so often applied in the construction of corporate powers, that we need not stop to refer to authorities.

Now, looking at the terms of the grant in this case, and giving to them their widest meaning either separately or in the connection in which they are found, or with the object for which the power was conferred, we find, indeed, a power to establish and regulate ferries within the corporate limits of the town, but not an exclusive power. Full effect is given to the words in which the power is granted, when the simple right is conceded to establish and regulate ferries. If the *grant had been [* 437] made to an individual in the terms here used, the question would have been too plain for argument. In our judgment, it can have no wider interpretation, though made to a corporation. It must be remembered that this is not the case where the crown or the legislature has aliened to a municipal corporation its whole power to establish and regulate ferries within its limits, as may be found in some of the ancient charters of cities in England and in this country. In those cases, the municipal body, in respect to this legislative or public trust, represents the sovereign power, and may make grants of ferry rights in as simple a manner as the sovereign. The error, we think, in the argument for the appellant, is in confounding this grant with these ancient charters, or those of a like character. But, on referring to them, it will be seen that the form of the grant is very different—much more particular and comprehensive, leaving no doubt as to the extent of the power. (25 Wend. R. 631, *Costar v. Brush*.) So here: if the legislature had intended to confer their whole power upon this corporation to establish and regulate ferries within its limits, or a power to grant

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exclusive ferry rights therein, a very different form of grant would have been used—one that would have expressed the intent of the law-maker to part with the exclusive power over the subject, and vest it in the grantee. In the form used, no such intent appears or can be reached, except by a very forced interpretation, which we are not at liberty to give, according to well-settled authority. (11 Pet. 422; 8 How. 569; *Mills et al. v. St. Clair Co. et al.*, 16 ib. 524, 534; *Fanning v. Gregoire.*)

In *Mills v. St. Clair Co.*, the court, speaking of a ferry grant, said that in a grant like this by the sovereign power, the rule of construction is, that if the meaning of the words be doubtful, they shall be taken most strongly against the grantee and for the government, and therefore should not be extended by implication beyond the natural and obvious meaning of the words; and if these do not support the claim, it must fall. And again, in *Fanning v. Gregoire*, speaking on the same subject, the court say: The exclusive right set up must be clearly expressed or neces-
 [* 438] sarily inferred, and the court think * that neither the one nor the other is found in the grant to the plaintiff nor in the circumstances connected with it.

As the town of Oakland had no power, according to the above construction of the charter, to establish an exclusive right of ferries within its limits, it follows that it did not possess the power to confer upon others an exclusive privilege to establish them.

The power conferred is to make (meaning to establish) and regulate ferries, or to authorize the construction (meaning the establishment) of the same.

We think the court below was right, and that the decree must be affirmed.

SALVADOR CASTRO, Appellant, v. THOMAS A. HENDRICKS, Commissioner of the General Land Office.

23 H. 438.

CALIFORNIA LAND GRANTS—SURVEY OF GRANTS.

1. In locating by surveys the grants confirmed under the act of 1851, the surveyor is to be bound by the decree of confirmation, so far as it fixes locations, boundaries, or quantity.
2. In making this survey his acts are under the control and supervision of the commissioner of the general land office, who cannot be compelled to affirm a survey and issue a patent, by a writ of *mandamus*, when such survey is manifestly wrong.

APPEAL from the circuit court for the District of Columbia. The case is well stated in the opinion.

Castro v. Hendricks.

Mr. Hepburn and Mr. Brent, for appellant.

Mr. Black, attorney general, for defendant.

* Mr. Justice CAMPBELL delivered the opinion of the court. [* 440]

The appellant petitioned the circuit court for a writ of *mandamus*, to be directed to the Hon. Thomas A. Hendricks, commissioner of the land office, commanding him to prepare and provide a patent to the appellant for a parcel of land in California, which had been confirmed to him by the decree of the district court for the northern district of California, and is described in a survey approved by the surveyor general of that State.

It appears from the petition and answer, and the papers filed in the circuit court, and forming a part of the record, that in the year 1839 the governor of California granted to Antonio Buelna a tract of land known as San Gregorio, of the extent of four square leagues, a little more or less, as is shown in the sketch attached to the expediente. In 1849, the representatives of Buelna (his widow and her husband) sold to the appellant one league of land in the location of San Gregorio; and in 1852 they executed a deed, conveying the same land, by the description of one league of land, in the place known by the name of San Gregorio, on the coast north of Santa Cruz, being part of a tract of land of four leagues, granted by the government to Antonio Buelna, and the same is declared to be situate and bounded as follows, and containing one league, more or less: commencing at a stake marked A, in the Canada de los Tunis, where the Arroyo de los Tunis comes out of the mountains; thence running southerly with the ridge of the mountains to the stake marked B, in the Arroyo *Hondo; [* 441] thence following said Arroyo Hondo until it meets the Arroyo de San Gregorio; thence, following the Arroyo de San Gregorio, to a stake marked C on a white rock in the mountain, situate on the west side of said arroyo; thence northwardly, about two miles, to a high conical peak of the mountain, on which is placed stake marked D; thence easterly to the place of beginning.

Separate claims were presented by the widow of Buelna and Salvador Castro for their respective portions of the rancho San Gregorio, and separate decrees of confirmation were made in the district court. The decree in favor of Madame Buelna is for three square leagues of the land within the boundaries described in the plan attached to the expediente, and referred to in the original grant, copies of which are on file in the cause. Salvador Castro was confirmed to the tract of land described in the deed by the metes and bounds before mentioned, with the addition, " being portion of the

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four leagues granted April 16, 1839, by J. B. Alvarado to Antonio Buelna, and known as San Gregorio, the tract hereby confirmed containing, by estimate, one square league, and being the same land described in the conveyance to the claimant." The two decrees were communicated to the surveyor general of California in 1857, and his returns are filed as testimony in the cause. He has laid off to Madame Buelna the three square leagues confirmed to her, and has surveyed for the appellant a tract within the specific calls of the deed and decree of fifteen thousand seven hundred and 54-100 acres. It is apparent, from this statement, that the surveyor general has entirely disregarded the limits of the rancho San Gregorio, and the restrictions as to quantity in the grant of Alvarado, governor of California, of April, 1839. But these, for the object before the court, were the controlling calls in the deed, as well as in the decree. The primary object of the act, "To ascertain and settle the private land claims in the State of California," approved 3d March, 1851, was to distinguish the vacant and public lands from those that were private property; and for this purpose, an inquiry into pre-existing titles became necessary. To [* 442] accomplish this, every person claiming lands * in California, by virtue of any right or title derived from the Spanish or Mexican government, was required to present the same to a board of commissioners. The mesne conveyances were also required, but not for any aim of submitting their operation and validity to the board, but simply to enable the board to determine if there was a *bona fide* claimant before it under a Mexican grant; and so this court have repeatedly declared that the government had no interest in the contests between persons claiming *ex post facto* the grant. *United States v. Sutter*, 21 How. S. C. R. 170.

The authentic evidence of what is private property is to be found in the grants of the government of California, and not in the mesne conveyances. Nor is this government charged to decide between claimants in the condition of those interested in the rancho San Gregorio. It was entirely competent for the district court to connect the claims arising under the same grant, and it will be its duty, in superintending the execution of the decrees of that court in such cases, to look to the evidence furnished by the grant itself as overruling in determining questions of boundary and location.

In the case of the *United States v. Fossatt*, 21 How. 445, this court had occasion to refer to the limits of the authority of the courts of the United States under the act of the 3d March, 1851, before cited. We stated in that case, that if questions of a judicial nature arose in the settlement of the location and boundary of the

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grants confirmed to individuals, the district court was empowered to settle those questions upon a proper case being submitted to it before the issue of the patent; and in such a case the judgment may properly extend to the confirmation of the survey, and an order for a patent to issue. But it was not the expectation of this court that the surveyor general should make returns to the district court in every case, nor did they imply that the validity of a survey depended on the recognition of that court, or its incorporation into a decree of the court. The surveyor general of California was charged with the duty to cause all private claims which shall be finally confirmed to be accurately surveyed, and to furnish plats for the same; and in the location *of the said claims, [* 443] he was invested with such power and authority as are conferred on the register of the land office and receiver of the public moneys of Louisiana, in the sixth section of the "Act to create the office of surveyor of the public lands for the State of Louisiana," approved 3d March, 1831. 4 Statutes at Large, 492. Under this act, the surveyor general exercises a quasi judicial power; and the claimant, with an authentic certificate of the decree of confirmation, and a plat or survey of the land, duly certified and approved by the surveyor general, is entitled to a patent. But, then, the commissioner of the land office, by virtue of enabling acts of congress, exercises a supervision and control over the acts of the subordinate officers charged with making surveys; and it is his duty to see that the location and survey made by that officer under the decree of the court, and which has not had the final sanction of the judicial tribunals, is in accordance with the decree. The refusal of the commissioner of the land office to issue a patent upon this survey was an appropriate exercise of the functions of his office, and the decree of the circuit court refusing a *mandamus* is affirmed with costs.

THOMAS BELL, Plaintiff in Error, v. THE MAYOR AND COUNCIL OF THE CITY OF VICKSBURG.

23 H. 443.

PRACTICE IN CIRCUIT COURTS—STATE PRACTICE.

Though, as a general principle, a plea is not demurrable because not verified by oath, as the statute requires, but the objection must be raised by motion, yet where the State court has held that the omission of the verification is good ground of demurrer, the circuit court should follow the rule of the State court on that subject.

WRIT of error to the circuit court for the southern district of Mississippi. The case is sufficiently stated in the opinion.

Bell v. Corporation of Vicksburg.

Mr. Benjamin, for plaintiff in error.

Mr. Badger and *Mr. Carlisle*, for defendants.

[* 444] *Mr. Justice CAMPBELL delivered the opinion of the court.

The plaintiff instituted this suit upon a sealed instrument, made in the name of the city of Vicksburg, payable to bearer. The defendant pleaded fifteen pleas; to ten of which the plaintiff demurred, and judgment was rendered for the defendant on the demurrer. Some of these pleas involved important questions touching the validity of the instrument, which have, since the decision of the circuit court, been the subject of discussion in the supreme court of Mississippi and in this court. It is conceded that nine of the pleas were insufficient, and that the demurrers should have been sustained to them. The remaining plea is the ordinary *non est factum*. This was filed without an affidavit of its truth, and this is required by a statute of Mississippi to authorize its reception. But the defendant contends that it is the office of a demurrer to call in question the sufficiency of a declaration or other pleading upon what appears upon its face, without reference to any extrinsic matter; that the affidavit is not a part of the plea; it is only that which is necessary to authorize the plea to be placed on file, and it may be waived either expressly or by implication. The filing of the plea is only irregular, and a demurrer or replication to it is a waiver. Upon the general principles of pleading, we assent to the accuracy of this argument.

Commercial and R. R. Bank of Vicksburg, 13 Pet. 60.

Nicholl v. Mason, 21 Wend. 339.

But in courts of States in which this statute exists, a plea of *non est factum*, without the affidavit required by it, is demurrable. Such is the practice in Mississippi.

Smith v. Com. Bank of Rodney, 6 S. & M. 83.

[* 445] *Johnston v. Beard, 7 S. and M. 214.

Bancroft v. Paine, 15 Ala. 834; 4 Ala. 198.

We do not question the power of the circuit court to maintain the rules of pleading in the manner of applying the statutes of a State, or it may adopt the usual practice in the State, if not contrary to an act of Congress.

We learn that the course of practice in the circuit court conforms to the State practice. We suppose that it would be a surprise upon the plaintiff, and might work injustice, if we were to sustain the plea under such circumstances.

Judgment reversed and cause remanded.

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FREDERICK FREDERICKSON and others, Plaintiffs in Error, v. THE STATE OF LOUISIANA.

23 H. 445.

CONSTRUCTION OF TREATY WITH WURTEMBERG CONCERNING TRANSFER AND DESCENT OF PERSONAL PROPERTY.

The treaty with Wurtemberg, which provides that "the citizens or subjects of each of the contracting parties shall have power to dispose of their personal property within the States of the other, by testament, donation, or otherwise; and their heirs, legatees, and donees, being citizens or subjects of the other contracting party, shall succeed to their said personal property, and may take possession thereof and dispose of the same at their pleasure, paying such duties as the inhabitants of the country where the property lies shall be liable to pay in like cases," has no application to the property of a naturalized citizen of the United States dying in Louisiana. His property is governed in this respect by the same rule as other citizens of Louisiana; and though formerly a citizen of Wurtemberg, he has no rights under that clause of the treaty.

WRIT of error to the supreme court of Louisiana. The case is fully stated in the opinion.

Mr. Taylor, for plaintiffs in error..

Mr. Benjamin, for defendant.

*Mr. Justice CAMPBELL delivered the opinion of the court. [* 446]

The defendant in error made opposition to the account filed in the settlement of the succession of John David Fink, deceased, in the second district court of New Orleans, because the executor did not place on the tableau ten per cent. upon the amounts respectively allowed to certain legatees, who are subjects of the king of Wurtemberg. By a statute of Louisiana, it is provided that "each and every person, not being domiciliated in this State, and not being a citizen of any other State or territory in the Union, who shall be entitled, whether as heirs, legatee, or donee, to the whole or any part of the succession of a person deceased, whether such person shall have died in this State, or elsewhere, shall pay a tax of ten per cent. on all sums, or on the value of all property which he may have actually received from said succession, or so much thereof as is situated in this State, after deducting all debts due by the succession." The claim of the State of Louisiana was resisted in the district court, on the ground that it is contrary to the provisions of the third article of the convention between the United States of America and his majesty the king of Wurtemberg, of the 10th April, 1844. That article is, that "the citizens or subjects of each of the contracting parties shall have power to dispose

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of their personal property within the States of the other, [* 447] by testament, donation, or otherwise; and * their heirs, legatees, and donees, being citizens or subjects of the other contracting party, shall succeed to their said personal property, and may take possession thereof, either by themselves, or by others acting for them, and dispose of the same at their pleasure, paying such duties only as the inhabitants of the country where the said property lies shall be liable to pay in like cases." This court, in *Mager v. Grima*, 8 How. S. C. R. 490, decided that the act of the legislature of Louisiana was nothing more than the exercise of the power which every State or sovereignty possesses of regulating the manner and terms upon which property, real and personal, within its dominion, may be transmitted by last will and testament, or by inheritance, and of prescribing who shall and who shall not be capable of taking it. The case before the district court in Louisiana concerned the distribution of the succession of a citizen of that State, and of property situated there. The act of the legislature under review does not make any discrimination between citizens of the State and aliens in the same circumstances. A citizen of Louisiana domiciliated abroad is subject to this tax. The *State v. Poydras*, 9 La. Ann. R. 165; therefore, if this article of the treaty comprised the succession of a citizen of Louisiana, the complaint of the foreign legatees would not be justified. They are subject to "only such duties as are exacted from citizens of Louisiana under the same circumstances." But we concur with the supreme court of Louisiana in the opinion that the treaty does not regulate the testamentary dispositions of citizens or subjects of the contracting powers, in reference to property within the country of their origin or citizenship. The cause of the treaty was, that the citizens and subjects of each of the contracting powers were or might be subject to onerous taxes upon property possessed by them within the States of the other, by reason of their alienage, and its purpose was to enable such persons to dispose of their property, paying such duties only as the inhabitants of the country where the property lies pay under like conditions. The case of a citizen or subject of the respective countries residing at home, and disposing of property there in favor of a citizen or subject of the other, was [* 448] not in *the contemplation of the contracting powers, and is not embraced in this article of the treaty. This view of the treaty disposes of this cause upon the grounds on which it was determined in the supreme court of Louisiana. It has been suggested in the argument of this case, that the government of the United States is incompetent to regulate testamentary dispositions

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or laws of inheritance of foreigners, in reference to property within the States.

The question is one of great magnitude, but it is not important in the decision of this cause, and we consequently abstain from entering upon its consideration.

The judgment of the supreme court of Louisiana is affirmed.

THE FANNIE CROCKER.

THOMAS WHITRIDGE and others, Appellants, v. JOSHUA DILL and others.

23 H. 448.

ADMIRALTY—COLLISION.

1. Where two sailing vessels are approaching each other in converging lines, and the one in the rear is the heaviest and the fastest sailer, it is her special duty to give way if there is danger of collision as they approach.
2. A vessel is in fault for want of a sufficient lookout, when the only lookout is so engaged in working the sails that he does not discover a vessel ahead of or parallel with his until too late to avoid a collision.

APPEAL from the circuit court for the district of Maryland. The facts are very fully stated in the opinion.

Mr. Brown and *Mr. Brune*, for appellants

Mr. Latrobe, for appellees.

* Mr. Justice CLIFFORD delivered the opinion of the court. [* 449]

This is an appeal from a decree of the circuit court of the United States for the district of Maryland. The libel was filed in the district court on the thirty-first day of March, 1855. It was a proceeding *in rem* against the schooner Fannie Crocker, and was instituted by the libelants, as the owners of the schooner Henry R. Smith, to recover damages on account of a collision which took place between those vessels on the ninth day of March, 1855, in the Chesapeake bay, whereby the latter vessel was run down and totally lost. As alleged by the libelants, their vessel sailed the day previous to the collision, from Hampton roads, in the State of Virginia, laden with a valuable cargo of oysters, and bound on a voyage to New Haven, in the State of Connecticut.

They also allege that at half-past eight o'clock, in the evening of the day of the collision, the wind being then from the northwest, and blowing a fresh breeze, and when their schooner was heading one point to the eastward of north, close hauled on the wind, an-

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other schooner was seen on their larboard quarter, about one-third of a mile distant; that the strange schooner sailed faster than the vessel of the libelants, and soon came up with and abeam of their vessel, when she put her helm up, bore away, and coming down on the vessel of the libelants, head on, struck her abreast the cabin, and so damaged her that she sunk in a few minutes, leaving the master and crew only time to escape on board the colliding vessel.

Many other facts and circumstances are stated in the libel to show that those on board the vessel of the libelants were [* 450] *not in fault, and that the collision was occasioned wholly through the unskillfulness and negligence of those in charge of the vessel of the claimants. In their answer, the claimants admit the collision, and that the vessel of the libelants was lost, but they deny that the circumstances attending the disaster are truly stated in the libel.

According to their account of the circumstances, it became necessary for the Fannie Crocker, between eight and nine o'clock in the evening of that day, and just before the collision, to tack, in order to alter her course. At that time, as they allege, she was heading towards the southern and western shore, but being under a double-reef mainsail, foresail, and jib, and in ballast trim, she failed to go round. Similar attempts, as they allege, were several times repeated, but without success. Finding that the vessel would not go round, the master then gave the order to wear ship, and in executing that order the main peak was lowered to enable the vessel to wear rapidly; but when the main boom passed over the deck, the wind caught the sail and threw it over the main gaff, and tore the sail from the leach-rope, rendering it perfectly useless. While assisting to execute this order, one of the seamen had his leg caught in the fore-sheet, and was severely injured, when all hands, except the master, who was at the wheel, went to relieve the seaman. After disengaging the seaman from his dangerous situation, the rest of the hands, as the claimants allege, were called to haul in the mainsail, which was then dragging in the water, and at this juncture another vessel, which subsequently proved to be the schooner of the libelants, was seen on the starboard quarter of the claimants' vessel, some three or four lengths off. In order to prevent the two vessels from coming in contact, the claimants allege that the helm of their vessel was put hard up, with a view to go to the stern of the strange vessel; but the effort was unavailing, and the two vessels came together, and, as the claimants allege, wholly through the carelessness and unskillful management of those in

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charge of the other vessel, in not altering their course in proper time to avoid a collision.

Some particularity has been observed in stating the defense, * in order that the respondents may have the full [* 451] benefit of the position they have assumed.

Two witnesses only were examined, on the part of the libelants, in respect to the circumstances of the disaster. In the district court a decree was entered for the libelants, allowing them the full value of their vessel and cargo; and on appeal to the circuit court, that decree was affirmed. Whereupon the respondents appealed to this court.

From the pleadings and evidence, it satisfactorily appears that the Henry R. Smith was a schooner of one hundred and thirty-four tons, and that she was laden with oysters, and bound on a voyage to New Haven, in the State of Connecticut. She was a staunch vessel, well manned and equipped, showed a proper light at the time of the collision, and had a sufficient and competent lookout. On the other hand, the Fannie Crocker was a schooner of two hundred and twenty-two tons, sailing in ballast, and was bound on a voyage from Dighton, in the State of Massachusetts, to Baltimore, in the State of Maryland. Like the other vessel, she was staunch, and well manned and equipped, but failed to show a light at the time of the collision, and had no sufficient lookout stationed on any part of the vessel. All of the witnesses state that the night was clear, and that there was no difficulty in seeing objects without lights at considerable distance. They mention no circumstance tending to authorize the conclusion that the collision can be justified or excused on account of the character of the night or the difficulties of the navigation. Occurring, as it did, inside of the capes, in the open bay, of a clear night, with no difficulties to encounter, except a fresh breeze from the northwest, it is obvious that one or both of the vessels must be in fault. They were both sailing in the same general direction; but the vessel of the respondents, being in ballast, and the larger of the two, was moving through the water at the greater speed. She was astern of the other vessel, and somewhat to the windward, but was sailing on a line converging to the track of the other vessel; and both vessels were close hauled on the wind.

Terry, the mate of the libellant's vessel, says when he first * saw the other schooner, she was half a mile distant [* 452] on the weather quarter. At that time both vessels were on the wind and standing the same way—to the northward and eastward. According to his account, the vessel of the respondents sailed faster than the vessel of the libelants, and ran down until

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she got abreast of her to the windward, when she was about fifty rods distant. He also states that when they first saw that she was coming down on them, they put the helm of their vessel up, and tried in every way to keep clear of her, but could not, as she had fallen off from her course, and was then before the wind.

Another witness (a seaman) was also examined by the libelants. His testimony substantially confirms the mate, and clearly shows that the vessel of the libelants was ahead, and that the other vessel was to the windward, and moving through the water much faster than the vessel of the libelants.

Both witnesses testify in effect that the approaching vessel, when she was nearly abreast of their vessel, fell off and struck the vessel of the libelants on the larboard quarter, as alleged in the answer. They both affirm that they had a sufficient and competent lookout and proper lights.

Several witnesses were also examined on the part of the respondents. Their account of the circumstances attending the disaster differs in several particulars from that given by the witnesses examined by the libelants. They all agree, however, that the vessel of the libelants was not seen by any one on board their vessel until she was so near that all efforts on their part to prevent a collision were unavailing.

In effect, they also admit that their vessel, at the time of the collision, had no lookout engaged in the performance of that duty. On this latter point, the master says that he had directed the steward, a colored man, to keep a lookout, and adds that he was somewhere about the main deck. But all hands had been called to haul in the mainsail, and the second mate states that he first saw the vessel of the libelants while he was engaged with the other hands in endeavoring to accomplish that object. When he saw

the vessel, he says she was only about three times the [* 453] length of his vessel off. * At that time, all the hands,

except the steward, were aft the mainsail, where they could not see the other vessel without changing their position. She was first descried by the second mate as he stepped up on to the "lazy board," so called, in order to haul up the damaged sail. He then cried out to the master to put the helm down, but the mate at the same time sung out to put the helm up. In this confusion, the master adopted the suggestion of the mate; and he admits that the steward, when the alarm was given, came running aft, and assisted him in changing the helm.

Two other witnesses state that the steward assisted the master in putting up the helm; and one of them says that no particular per-

son was keeping watch, and attempts to justify the neglect upon the ground that it is not customary to have a man forward when all hands are called to take in the sails.

Suffice it to say, without entering more into detail, that the testimony of the respondents shows conclusively that their vessel had no sufficient lookout at the time of the collision; and the second mate, who first discerned the vessel of the libellants, testifies, without qualification, that if they had seen her three or four minutes sooner, they could have cleared her and prevented a collision.

From these facts, which are proved beyond doubt, it necessarily follows that the vessel of the respondents was in fault. She had no lookout; and the neglect of that precaution contributed to the disaster, and in all probability was the sole cause that produced it.

2. Assuming that the vessel of the respondents was not sufficiently to the windward to have passed the other vessel in safety, then she was also in fault, because she did not seasonably give way and pass to the right. Where a vessel astern, in an open sea and in good weather, is sailing faster than the one ahead, and pursuing the same general direction, if both vessels are close hauled on the wind, the vessel astern, as a general rule, is bound to give way, or to adopt the necessary precautions to avoid a collision. That rule rests upon the principle that the vessel ahead, on that state of facts, has the seaway before her, and is entitled to hold her position; * and consequently the vessel coming up must keep [* 454] out of the way.

Speaking of steamers, Judge Betts said, in the case of the Governor, Abbott's Adm. R. 110, that the fact that they were running in the same direction, the one astern of the other, imposed upon the rear boat an obligation to precaution and care, which was not chargeable, to the same extent, upon the other. He accordingly held, that a vessel in advance is not bound to give way, or to give facilities to a vessel in her rear, to enable such vessel to pass; but that the vessel ahead is bound to refrain from any manœuvres calculated to embarrass the latter vessel while attempting to accomplish that object. Similar views had previously been announced by the same learned judge, in the case of the steamboat Rhode Island, decided in 1847. In that case, it is said the approaching vessel, when she has command of her movements, takes upon herself the peril of determining whether a safe passage remains for her beside the vessel preceding her, and must bear the consequences of misjudgment in that respect. No immunity is extended by the law to the one possessing the greater speed; and so far from encouraging the exercise of the power to its utmost, the law cautiously warns

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and checks vessels propelled by steam against an improvident employment of speed, so as to involve danger to others, being stationary or moving with less velocity. *Olcott's Adm. R.* p. 515.

That case was appealed to the circuit court, where it was affirmed. *The Rhode Island*, 1 Blatch. C. C. 363.

Emerigon says, a ship going out of a port last is to take care to avoid the vessel that has gone out before her, and he mentions the case of a small vessel which went out of the port of Marseilles, and in tacking struck a boat that went out before her, which was also tacking. Claim for damages was made by the boat, and the judges were of opinion that the vessel going out last is to take care to avoid the one before it. Emerigon, chap. 12, sec. 14, p. 330. Other continental authorities may be cited to the same effect. Whether it be by night or day, says Valin, b. 2, p. 578, the ship that leaves after another, and follows her, should take [* 455] care to avoid a collision, *without which she will have to answer in damages. *Sibille de Abordage*, sec. 249.

We are not aware that the precise question presented in this case has been ruled by any of the federal courts. Remarks are certainly to be found in the opinion of the court in the case of the *Clement*, 17 Law Rep. 444, which are inconsistent with the proposition here laid down. That case was appealed to the circuit court, and was there affirmed. But the remarks to which we refer were not necessary to the decision of the cause, and we think they must be received with some qualification. *The Clement*, 2 Cur. C. C. 368, sec. 1; *Pars. Mar. Law*, p. 197, note 2.

Without further discussion of the general principle at the present time, it will be sufficient to say, that we are satisfied that the rule assumed in this case is one well calculated to prevent collisions, and that it is one which ought to be constantly observed and enforced in all cases where it is applicable. That exceptional cases may arise is not at all improbable; but it will be the proper time to consider them when they are presented for decision. For these reasons, we are of the opinion that the vessel of the respondents was wholly in fault. Objection was made to the damages as excessive, on the ground that the vessel might have been raised from where she was sunk. After a careful examination of the testimony, we think the objection cannot be sustained.

The decree of the circuit court is therefore affirmed with costs.

Jenkins v. Banning.

CHARLES E. JENKINS and others, Plaintiffs in Error, v. WILLIAM S. BANNING.

23 H. 455.

PRACTICE IN SUPREME COURT—DAMAGES FOR DELAY.

Where there is and no bill of exceptions, no merits of any kind shown in the defense below, the judgment here will be affirmed with ten per cent. damages per annum, counting from the date of the judgment below.

WRIT of error to the circuit court for the district of Missouri. The case is stated in the opinion.

No counsel appearing for appellant, *Mr. Gillet*, for appellee, argued the case, and asked for an affirmation with damages.

*Mr. Justice CLIFFORD delivered the opinion of the court. [*456]

This case comes before the court upon a writ of error to the district court of the United States for the district of Wisconsin. It was an action of debt upon a judgment recovered by the present defendant against the plaintiffs in error, in the district court of the United States for the second judicial district of the territory of Minnesota. As originally framed, the declaration did not contain any caption specifying the term of the court when it was filed, or the return day of the process on which it was founded. In point of fact, it was filed on the thirtieth day of December, 1857, and the process was regularly returnable to the succeeding January term of the district court, to which this writ of error issued. Service of the summons upon the defendants was duly made on the following day, and the record shows that they subsequently appeared and demurred to the declaration, showing for cause the formal defects before mentioned. On the eighteenth day of January, 1858, the plaintiff, by leave of the court, amended his declaration, obviating the defects shown by the demurrer.

No exceptions were taken to the order of the court granting leave to amend, and, for aught that appears to the contrary, the amendment was made without objection.

After the amendment was allowed, the court overruled the demurrer, and the defendants refusing or neglecting to plead to the merits of the case, they were defaulted. Whereupon the plaintiff moved for judgment, and filed a duly-certified copy of the former judgment on which the suit was founded. Reference was then made of the cause to the clerk to compute the interest, and on his report being made in writing, *judgment was [*457] given in favor of the plaintiff for the amount of the former judgment, together with interest on the same.

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On this state of the record, the defendants sued out a writ of error, and removed the cause into this court, but have failed to appear and prosecute their writ of error. They did not except to the ruling of the district court, and have not assigned error in this court, and it is obvious, from an inspection of the transcript, that there is no error in the proceeding. Motions to amend mere formal defects in the pleadings are always addressed to the discretion of the court, and are usually granted as a matter of course, and their allowance is never the subject of error. That point has been so frequently decided, that we do not think it necessary to cite authorities in its support.

Under these circumstances, the counsel for the defendant in error moves that the judgment be affirmed with ten per cent. damages. By the twenty-third rule of this court, it is provided that in all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out for delay, damages shall be awarded at the rate of ten per centum per annum on the amount of the judgment, and the said damages shall be calculated from the date of the judgment in the court below, until the money is paid.

That rule is applicable to this case, and the judgment is accordingly affirmed, with costs and ten per cent. damages.

JOHN DOE, *ex dem.* MANN and HANNAH, Plaintiffs in Error, v.
WILLIAM WILSON.

23 H 457.

SPECIAL RESERVE TO INDIANS IN A TREATY—DEED OF RESERVED RIGHT VALID.

1. When, by the treaty of October 27, 1832, with the Pottawatomie Indians, the tribe surrendered all their rights to the lands then ceded, and the United States agreed that certain quantities should be reserved to particular Indians, these latter became tenants in common with the government of the title in fee, until the President, after surveys were made, should locate these reservations.
2. In the absence of anything in the treaty or any act of congress to prevent it, the individual Indian could sell and convey this title as fully as any other person.
3. Such a conveyance, made before the survey and the selection by the President and the issue of the patent, would attach to the land when patented; and the recital in the patent that it was for the land reserved for that individual Indian would be conclusive in favor of the purchaser as to its identity.

WRIT of error to the circuit court for the district of Indiana.
The case is well stated in the opinion.

Mr. Baxter, for plaintiff in error.

Mr. Niles, for defendant.

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* Mr. Justice CATRON delivered the opinion of the court. [* 461]

By the treaty of October 27, 1832, made by the United States, through commissioners, with the Pottawatomie tribe of Indians of the State of Indiana and Michigan territory, said nation ceded to the United States their title and interest in and to their lands in the States of Indiana and Illinois, and the Michigan territory, south of Grand river.

Many reservations were made in favor of Indian villagers jointly, and to individual Pottawatomies. The reservations are by sections, amounting probably to a hundred, lying in various parts of the ceded country. As to these, the Indian *title [* 462] remained as it stood before the treaty was made; and to complete the title to the reserved lands, the United States agreed that they would issue patents to the respective owners. One of these reservees was the chief, Pet-chi-co, to whom was reserved two sections. The treaty also provides, that "the foregoing reservations shall be selected under the direction of the President of the United States, after the land shall have been surveyed, and the boundaries shall correspond with the public surveys."

In February, 1833, by a deed in fee simple, Pet-chi-co conveyed to Alexis Coquillard and David H. Colerick, of the State of Indiana, "all those two sections of land lying in the State aforesaid, in the region of country or territory ceded by the treaty of 27th October, 1832." The grantor covenants that he is lawful owner of the lands; hath good right and lawful authority to sell and convey the same. And he furthermore warrants the title against himself and his heirs. Under this deed, the defendant holds possession.

The lessors of the plaintiff took a deed from Pet-chi-co's heirs, dated in 1855, on the assumption that their ancestor's deed was void; he having died in 1833, before the lands were surveyed, or the reserved sections selected. And on the trial below, the court was asked to instruct the jury, "that Pet-chi-co held no interest under the treaty in the lands in question, up to the time of his death, that was assignable; he having died before the location of the land, and before the patents issued."

This instruction the court refused to give; but, on the contrary, charged the jury, that "The description of the land in the deeds from Pet-chi-co to Coquillard and Colerick, from Colerick to Coquillard, and from Coquillard to Wilson, are sufficient to identify the land thereby intended to be conveyed as the same two sections of land which are in controversy in this suit, and which are described in the patents which have been read in evidence."

It is assumed that the lands embraced by the patents to Pet-

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chi-co, made in 1837, do not lie within the section of country ceded by the treaty of 27th October, 1832; and therefore the [* 463] *court was asked to instruct the jury that the defendants cannot claim nor hold the land as assignees of Pet-chi-co, by virtue of the treaty. The demand for such instruction was also refused.

There is no evidence in the record showing where the land granted by the patents lies, except that which is furnished by the patents themselves. They recite the stipulation in the treaty in Pet-chi-co's behalf; that the selections for him, of sections nine and ten, had been made, "as being the sections to which the said Pet-chi-co is entitled," under the treaty. The recitals in the patents conclude all controversy on this point.

The only question presented by the record that we feel ourselves called on to decide is, whether Pet-chi-co's deed of February, 1833, vested his title in Coquillard and Colerick.

The Pottawatomie nation was the owner of the possessory right of the country ceded, and all the subjects of the nation were joint owners of it. The reservees took by the treaty, directly from the nation, the Indian title; and this was the right to occupy, use, and enjoy the lands, in common with the United States, until partition was made, in the manner prescribed. The treaty itself converted the reserved sections into individual property. The Indians as a nation reserved no interest in the territory ceded; but as a part of the consideration for the cession, certain individuals of the nation had conferred on them portions of the land, to which the United States title was either added or promised to be added; and it matters not which, for the purposes of this controversy for possession.

The United States held the ultimate title, charged with the right of undisturbed occupancy and perpetual possession, in the Indian nation, with the exclusive power in the government of acquiring the right. *Johnson v. McIntosh*, 8 Whea. 603; *Comet v. Winton*, 2 Yerger's R. 147.

Although the government alone can purchase lands from an Indian nation, it does not follow that when the rights of the nation are extinguished, an individual of the nation who takes as private owner cannot sell his interest. The Indian title is [* 464] property, and alienable, unless the treaty had *prohibited its sale. *Comet v. Winton*, 2 Yerger's R. 148; *Blair and Johnson v. Pathkiller's Lessee*, 2 Yerger, 414. So far from this being the case in the instance before us, it is manifest that sales of the reserved sections were contemplated, as the lands ceded were

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forthwith to be surveyed, sold, and inhabited by a white population, among whom the Indians could not remain.

We hold that Pet-chi-co was a tenant in common with the United States, and could sell his reserved interest; and that when the United States selected the lands reserved to him, and made partition, (of which the patent is conclusive evidence,) his grantees took the interest he would have taken if living.

We order the judgment to be affirmed.

THE UNITED STATES, Appellants, v. ANDRES CASTILLERO.

23 H. 464.

CALIFORNIA LAND GRANTS.

An order of the central Mexican government to the governor of California authorized him to grant the lands of the islands adjacent to the department in conjunction with the assembly. A dispatch of the same date required him to reserve such islands as Castillero might select, and grant the same to him. Held, that a grant of the island of Santa Cruz under this order to Castillero did not require the confirmation of the assembly, and, being regular in all other respects, must be confirmed.

APPEAL from the district court for the southern district of California. The case is well stated in the opinion.

Mr. Stanton, for the United States.

No appearance for appellee.

* Mr. Justice CLIFFORD delivered the opinion of the court. [* 465]

This is an appeal from a decree of the district court of the United States for the southern district of California, affirming a decree of the commissioners appointed under the act of the third of March, 1851, to ascertain and settle private land claims.

Pursuant to the eighth section of that act, the appellee in this case presented his petition to the commissioners, claiming title to the island of Santa Cruz, situated in the county of Santa Barbara, in the State of California, by virtue of an original grant from Governor Alvarado. All of the documentary evidences of title produced in the case are duly-certified copies of originals found in the Mexican archives, as appears by the certificate of the surveyor general, which makes a part of the record. They consist of a special dispatch from the minister of the interior of the republic of Mexico, addressed to Governor Alvarado; the petition of the claimant to the same, and the original grant to the petitioner, which purports to be signed by the governor, and to be duly counter-

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signed by the secretary of the department. Certain other documents were also introduced, to which it will be necessary to refer, as a part of the proceedings that led to the grant.

Islands situated on the coast, it seems, were never granted by the governors of California or any of her authorities, under the colonization law of 1824, or the regulations of 1828. From all that has been exhibited in cases of this description, the better opinion is, that the power to grant the lands of the islands was neither claimed nor exercised by the authorities of the department prior to the twentieth day of July, 1838, as was satisfactorily shown in one or more cases heretofore considered and decided by this court.

On that day, the minister of the interior, by the order of the Mexican president, addressed a communication to Governor Alvarado, authorizing him, in concurrence with the departmental assembly, to grant and distribute the lands of the desert islands adjacent to that department to the citizens of the nation who might solicit the same. That dispatch bears date at a period [* 466] when the president was in the exercise of *extraordinary powers, and was issued, as appears by recitals, with a view to promote the settlement of the unoccupied islands on the coast, and to prevent those exposed positions from becoming places of rendezvous and shelter for foreign adventurers, who might desire to invade that remote department. Grants made by the governor, under the power conferred by that dispatch, without the concurrence of the departmental assembly, were simply void, for the reason that the power, being a special one, could only be exercised in the manner therein prescribed. It was so held by this court in *United States v. Osio*, decided at the present term, and we are satisfied that the decision was correct.

But the grant in this case was not made under the general authority conferred by that dispatch. In addition to what was exhibited in the former case, it now appears that another dispatch of a special character was addressed by the same cabinet minister to the governor on the same day. Like the other, it bears date at the city of Mexico, on the twentieth day of July, 1838, and is signed by the minister of the interior. By the terms of the communication, the governor is informed that the president, regarding the services rendered by this claimant to the nation and to that department as worthy of great consideration and full recompense, has directed the minister to recommend strongly to the governor and the departmental assembly that one of the islands, such as the claimant might select, near where he ought to reside with the troops under his command, be assigned to him, before they proceed to

grant and distribute such lands, under the general authority conferred by the previous dispatch.

Beyond question, the legal effect of that second communication was to withdraw such one of the islands as should thus be selected by the claimant from the operation of the previous order, and to direct that it be assigned to this claimant. His attorney, accordingly, on the fifth day of March, 1839, presented his petition to the governor, asking for a grant of the island of Santa Catalina, which is situated in front of the roadstead of San Pedro, and requested that the expediente might pass through the usual forms.

*In conformity to the prayer of the petition, the governor, [* 467] on the same day, made a decree that a title of concession should issue, and that the expediente should be perfected in the usual way. Accompanying the order of concession there is also a form of a grant of the island to the claimant; but it is without any signatures, and does not appear ever to have been completed.

On the seventeenth day of March, 1839, his attorney in fact presented another petition to the governor, asking for a grant of the island of Santa Cruz, which, as he represents, is situated in front of Santa Barbara, on the coast of that department.

Both of these petitions are based upon the special dispatch addressed to the governor; and in the one last presented, the claimant represents that the island previously offered is wholly unfit either for agricultural improvement or the raising of stock, and for that reason prays, in effect, that the order of concession may be so changed as to conform to his last-mentioned request. For aught that appears to the contrary, his request was acceded to without hesitation, for, on the twenty-second day of May, 1839, the governor made the grant, basing it upon the special dispatch referred to in the petition.

To prove the authenticity of the dispatch and the genuineness of the grant, the petitioner called and examined Governor Alvarado. He testified that he was acquainted with the handwriting of Joaquin Pesado, the minister of the interior, and also with that of Manuel Jimeno, the secretary of the department, who countersigned the grant. Both of these signatures, as well as his own, he testified were genuine; and he also stated that he recognized the document as a genuine instrument, and intended it at the time as a perfect and complete title in the claimant. His testimony finds support in this case, to some extent, by the fact that all the documentary evidences of title, including the grant, were found in the Mexican archives; but much stronger confirmation of his statements is de-

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rived from the record evidence which those archives are found to contain.

At the argument, we were very properly furnished by the counsel of the appellants with a copy of an index of concessions, prepared by the secretary of the department. That index covers the period from the tenth day of May, 1833, to the twenty-fourth day of December, 1844. It contains a list of four hundred and forty-three concessions, and among the number is the one set up by the claimant in this case. Its description in the index corresponds in all particulars with the grant produced, except as to the date. As there given, it is dated the fifth day of March, 1839, which is the true date of the concession, under the first petition.

Considering that the name of the grantee and the description of the premises agree with the grant produced in the case, we think it a reasonable presumption that the error of date is in the index, and not in the grant. For these reasons, we think the genuineness of the documentary evidence of title is satisfactorily proved. Having come to this conclusion, the only remaining question is, whether the grant was made by competent authority. Direction was given to the governor and the departmental assembly in the special dispatch on which this grant was issued, that one of the islands, situated along the coast of the department, should be assigned to this claimant before they proceeded to grant and distribute such lands under the general order. Those communications were of the same date; but it is obvious, from the language of the special dispatch, that it was issued subsequently to the other communication, and must be regarded as qualifying the latter, so far as their terms are repugnant. Had the claimant petitioned for a grant of this description, under the general order, his application would have been addressed to the discretion of the governor and of the departmental assembly; and unless both had concurred in granting the prayer, his application would have been defeated, for the reason that such a title could only be adjudicated by their concurrent action. Power to refuse such applications was vested in the assembly as well as in the governor; but when both concurred, and the adjudication had been made, the title papers were properly to be issued by the governor as an executive act. As the assembly was a constituent part of the granting power under the general order, it was doubtless thought proper that the withdrawal of one of the islands from its operation, and the disposal of it in another way, should be notified to the assembly as well as to the governor. They were accordingly directed not to proceed to make

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adjudications under that order until the assignment of the title to this claimant was perfected, but they were not required to make the assignment or to cause it to be made. To accomplish that purpose, and carry into effect the command of the president, two things only were necessary to be done: one was to be performed by the claimant, and the other was a mere ministerial act. It was the claimant who was to make the selection; and if it was a proper one, near the place where he was stationed with his troops, nothing remained to be done but to make the assignment as described in the dispatch. Emanating as the dispatch did from the supreme power of the nation, it operated of itself to adjudicate the title to the claimant, leaving no discretion to be exercised by the authorities of the department. Neither the governor nor the assembly, nor both combined, could withhold the grant, after a proper selection, without disobeying the express command of the supreme government. Nothing therefore remained to be done, after the selection by the claimant, but to issue the title papers, and that was the proper duty of the governor, as the executive organ of the department. No doubt appears to have been entertained of the justice of the claim, either by the commissioners or the district court; and in view of all the circumstances, we think their respective decisions were correct. The decree of the district court is therefore affirmed.

MARTIN VERY, Plaintiff in Error, v. GEORGE C. WATKINS.

23 H. 469.

EVIDENCE—DECLARATIONS OF CO-SURETY—PRACTICE IN EQUITY.

1. The declarations of one of the co-sureties in a bond, who is dead, is not evidence against the other in a suit on the bond. Nor is his statement in writing evidence against his co-surety.
2. A levy on personal property is not necessarily void, because the officer does not take manual possession of it. He has the right to deposit goods with a receptor, and he may leave it, if he chooses, in the custody of the party who had possession when the levy was made.
3. When property held by a receiver *pendente lite* is by decree of the court vested in one of the parties to the suit, his title to it is perfect, and it is liable as other property to be levied on by execution for his debts.
4. But the receiver can only be held liable for not delivering to the successful party in the decree when a copy of that decree is produced to him, and a receipt tendered, accompanying the demand for delivery. Such a course is not a mere form. It is proper to prevent future litigation.

WRIT of error to the circuit court for the district of Arkansas.
The case is very fully stated in the opinion.

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Mr. Stillwell, for plaintiff in error.

Mr. Watkins, for defendant.

[* 470] * Mr. Justice WAYNE delivered the opinion of the court.

On the 3d March, 1841, at Little Rock, Arkansas, one James Levy gave his obligation with a mortgage for \$4,000, with interest, due six years after date, to one Darwin Lindsley, who soon after assigned the obligation to Martin Very, the plaintiff in error. In March, 1843, Levy paid to Very \$2,000, and at the same time executed a promise, in writing, to pay the residue of the debt in jewelry and other wares, which Very agreed to receive in payment, to be selected within a year from that time, from Levy's stock of goods. Very refused to perform the agreement, and in 1848 brought an action on the original obligation, to which Levy pleaded the agreement by way of accord and satisfaction, with an offer to perform on his part. The supreme court of Arkansas, on an appeal, held it to be in equity * a clear accord and satisfaction, upon a good consideration, because the creditor by that arrangement received payment of nearly half of the debt in advance, and because the residue was to be paid almost four years before the debt became due. In the meantime, Very brought a bill to foreclose the mortgage in the circuit court of the United States for the district of Arkansas, to which Levy set up the same defense by way of answer. In April term, 1850, the court sustained the defense of Levy, and decided that Very should select from the stock of goods in question a sufficient amount according to their value, on the 3d March, 1844, to satisfy the rest of the debt. It then became necessary to appoint a receiver in the cause. John M. Ross was appointed receiver, and gave a bond, with E. Cummins and George C. Watkins as securities, in the penal sum of \$5,000, with the condition that he would faithfully discharge his duties as receiver, with respect to such goods as might be brought into court, and that he would carefully keep and dispose of them in conformity with such order and decree as the court might make in that suit.

In consequence of Very's refusal to abide by his agreement, Levy was obliged to keep his stock of goods on hand to tender them to Very, according to the agreement. But Levy had other creditors, who seized upon the same goods in execution, and they were in possession of the sheriff when Ross was made receiver, and from the sheriff he received them. The next step was an order from the district judge, directing Very to select from a box of jewelry in the hands of the receiver such an amount, according to the value of the

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goods in March, 1843, as would be sufficient to discharge the balance of the debt due to him. This he refused to do, and then the clerk of the supreme court of Arkansas was directed, with the assistance of two skillful and disinterested persons, to make a selection from the goods for Very.

It was done. A report was made that the value of the goods in March, 1844, had been \$5,777, and that according to that value a selection had been made to the amount of \$2,002.59, to pay Very's claim upon Levy, and that the goods had been set apart for that purpose, with an inventory. A *final decree was [* 472] then made, authorizing Levy to withdraw the remainder of the goods from the hands of the receiver, adjudging also that Very should take the selected goods in payment of the residue still due upon the bond and mortgage, and that Ross, the receiver, should deliver them to him on demand. Very refused to abide by that decree, and prosecuted an appeal to this court. Here the decree of the court below was affirmed. On its return, Very refused to pay the costs. Levy had to pay them in order to get a mandate from this court to carry its decree into execution. Under these circumstances, Levy sued out a writ of execution, and directed it to be levied on the goods belonging to Very, still in the hands of Ross. The receiver and the marshal returned it without further action on the writ. A *venditioni exponas* was then issued, and the goods were sold by the marshal for \$260, the full value of them at that time, in their then condition. Three years and six months passed, and then Very, having acquiesced all of that time in what had been done, commenced this suit to recover from Watkins, as the security of Ross, damages for a breach of his bond, alleging that he had carelessly kept the jewelry which had been in his possession as receiver, and for not having surrendered it to him when he demanded it, as under the decree of the court he had a right to do.

Watkins filed three pleas to this action. The first is a detailed narrative of the proceeding in the suit between Very and Levy to the appointment of Ross as receiver, and showing that, by the decree, Very had been required to receive, in satisfaction of the debt due to him by Levy, jewelry to the amount of \$2,002.59 ; and that from that decree they had appealed to the supreme court of the United States, where the decree of the court below had been affirmed with costs. *Very v. Levy*, 13 How. 345. And further stating, that Levy had paid the costs of the suit in the supreme court, and that the jewelry, still being in the hands of Ross, had been levied upon and sold by the marshal, and that the proceeds of it were

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applied to the repayment of Levy of the costs, which Very was bound to pay by the decree.

Watkins, in his second plea, denied that the jewelry [* 473] had * been injured from the careless keeping of Ross; and his third plea is a denial that Very had ever demanded it from Ross.

Upon the trial of the case, the plaintiff excepted to the rulings of the court, as well for excluding as for admitting testimony.

We have examined with some pains the plaintiff's assignments of error, without finding cause for sustaining either of them. The first is, that the court refused to permit a witness to testify to a conversation between himself and Cummins, the co-surety of Watkins, for the purpose of fixing upon the latter a liability in this action to the plaintiff. It seems that Watkins was not present at that conversation. Whatever it may have been, it was inadmissible; and had Cummins been alive, and had been called as a witness to narrate it, he would not have been a competent witness to fix upon his co-surety a separate liability for an alleged breach of the bond by their principal, for which they had made themselves mutually responsible. The argument of the counsel for the defendant in error is unanswerable upon this point.

The second, third, fourth, fifth, and sixth assignments of error are complaints because the court admitted evidence directly pertinent to the issues which had been made by the pleadings, and defensive as to the imputed negligence of Ross in keeping the goods committed to him as receiver, and as to their condition, quality, and value, when they were turned over to him under the order of court; and as to their condition when it was levied upon by the marshal to pay the costs of the supreme court.

The seventh assignment of error was the refusal of the court to admit a paper in the handwriting of Cummins, the deceased co-surety of the defendant, to show that the testimony of the other witnesses, Dort and Kirk, was not consistent with the appraisal which they had made, pursuant to the order of the court. It was clearly inadmissible.

The eighth and ninth assignments of error relate to the levy upon the jewelry by the deputy marshal; and the court is asked to instruct the jury: "If the levy was made without seeing the jewelry and taking it into possession, they should [* 474] * disregard it as any evidence of any levy; as, in law, a levy upon personal property—which jewelry is—cannot be made without having a sight of it, and taking possession thereof."

The court refused the instruction as asked; but said to the jury,

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that to make a valid levy on goods and chattels on a writ of *fi. fa.*, if the officer charged with the duty has a view of them, and they are in his power, and he declares that he makes a levy or seizure of them in execution, such is a valid levy without taking them into his possession.

The objection to this instruction seems to be, that there had been an insufficient seizure, because the officer did not take manual possession of the box containing the jewelry, but left it in the keeping of Ross, who had pointed it out to him when he came to make the levy. But the evidence establishes that a levy was made by the officer, and that he returned the execution to the marshal, for further proceedings upon it.

It cannot be implied that the levy was incomplete, on account of the box having been left where it was when the levy was made, where it had been kept by Ross whilst he continued to be receiver, and where it remained afterwards, from Very not having demanded it, as he had a right to do and should have done.

After a levy has been made with a *fi. fa.* upon goods and chattels, the officer may confide them to another person for safe keeping, until there has been a settlement of the judgment and payment of all costs.

The court, in giving this instruction to the jury, went further than it was necessary to do, without, however, having interfered with the right of the jury to find from the evidence whether or not a levy had been made.

The tenth assignment of error relates to the instruction of the court, that by the decree of the court below in August, 1850, and the affirmance of it by this court in 1851, Ross ceased to act as receiver, and from thenceforth held the jewelry in question only as the trustee of Very. That decree put an end to the controversy, excepting to what remained to be done under the mandate of the court for the execution of its decree. It is true that Ross, as receiver, had not been *discharged by a formal order [*475] upon motion when the decree was made; but it is also true that the jewelry, by the decree, was made the property of Very, and that he could have demanded it from Ross, and that he could not justifiably have refused to deliver it. It was the property of Very for all purposes, as any other that he owned, or which could have been conveyed to him by any kind of title. It was, as such, liable for his debts. It seems to have been considered by the counsel of Very as liable for the costs of appeal in the supreme court, which Very had neglected to pay. Levy, however, paid them, and obtained an execution against Very for his reimburse-

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ment, which was as well leviable upon this property still in the possession of Ross as upon any other. It was allowed by him voluntarily to remain where the law had placed it, without having made any proper demand for it under the decree. We do not consider the application for it by Mr. Fowler, as the attorney of Very, a proper demand. Mr. Fowler's relation to him was not that special attorneyship which authorized him to demand it in the manner that he did. No doubt that both Mr. Cummins himself and Mr. Fowler thought themselves empowered, as attorneys in the suit, to withdraw it from Ross, to make a private sale of it for the payment of the costs due by Very.

But Ross had responsibilities in the matter under the decree, which gave him the right to withhold it from the counsel of one of the parties, until a demand was made upon him, according to what the course of equity practice requires to be done under such decrees. It matters not what causes he may have assigned to Mr. Fowler for not delivering the jewelry to him, for, in a controversy to make the security of Ross liable for an alleged breach of his bond, the former is entitled to have the benefit of any irregularity which his principal could have resisted. According to the practice in equity, under such a decree as this is, authorizing Very to demand the jewelry, the demand should have been made under a certified copy of that part of the decree; at least, permitting Very to demand the property, and requiring Ross to surrender it, with a receipt [* 476] upon it, either by Very or by his attorney, that the *goods were surrendered by Ross. Upon the return of such a certificate, the court would have directed it to be put on file with the other papers in the suit, as a voucher for the protection of Ross from further responsibility to the parties, and as evidence that its decree in that particular had been executed. Such a course is not merely a form, to be followed or not, as parties to such a decree may please, but it is a cautionary requirement, to prevent further litigation, by exactness in the performance of a decree in equity. Had it been observed in this instance, this suit would not have been brought.

The instruction as given is in conformity with the decree. Having examined every assignment of error, we shall direct the judgment of the court below to be affirmed.

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THE UNITED STATES, Appellants, v. JAMES MURPHY.
THE UNITED STATES, Appellants, v. EMANUEL PRATT.

23 II. 476.

SUTTER'S CLAIM.

The court reiterates its decision that claims founded on Sutter's general title are invalid.

THESE are appeals from the northern district of California.

Mr. Stanton, for the United States.

No appearance for appellees.

Mr. Justice CAMPBELL delivered the opinion of the court.

The appellees in these suits were respectively confirmed in their claims to land in the valley of the Sacramento river.

Their applications were made to Micheltorena in 1844; and upon a reference, Captain Sutter reported that the land was vacant. Upon the advice of the secretary, further action was deferred until the governor could visit that portion of the department, and leave was given to the petitioner to occupy the land until that time.

In December of that year, the "general title" to Sutter was issued, and in 1845 or 1846, after the deposition of Micheltorena as governor, Sutter gave copies of that title to [* 477] the petitioners. In the testimony of Sutter, in the case of Pratt, he says "that he applied for the paper a few weeks before the couriers arrived with it; that duplicates were sent to him, and that it was designed as a bounty to the soldiers who had served under him, for their services in the war."

We have already expressed our opinion upon the merits of this title in several cases, during this and the last term; and it remains only to say that the decrees of the district court must be reversed, and the causes remanded with directions to the district court to dismiss the petition in each.

JOHN F. and MICHAEL P. CALLAN, Appellants, v. CHARLES W. STATHAM and others.

23 H. 477.

EQUITY PRACTICE.

The bill in this case was brought to declare void a conveyance of real estate as made in fraud of creditors. Held,

That though both vendor and vendee denied the fraud, and alleged in their answers that the purchase money had been paid, the following circumstances sufficiently rebutted the answer: Inadequate consideration of the price; possession and recep-

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tion of rents by vendor; prior indebtedness of vendor, and pending suits against him at the date of conveyance, well known to vendee, who was his brother, and the absence of all attention or evidence of interest of vendee in the matter, and of any proof of payment except the answer.

APPEAL from the circuit court for the District of Columbia.

Mr. Walter S. Cox and *Mr. Davis*, for appellants.

Mr. Chilton and *Mr. Davidge*, for defendants.

[* 478] *Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from a decree of the circuit court of the District of Columbia.

The suit below was a creditor's bill, filed by Statham and others, the appellees, to set aside a deed made by J. F. Callan and wife to M. P. Callan, on the 16th October, 1854, conveying lot No. 8, in square No. 456, with the improvements, in the city of Washington, and to subject it to the payment of the plaintiff's judgments.

Judgments to an amount exceeding \$3,000 were recorded against J. F. Callan, 5th May, 1855. The deed was recorded 14th April, 1855.

A second bill was filed against the same parties and others, on the 9th August, 1856, by Austin Sherman, a judgment creditor of J. F. Callan, for the purpose of setting aside the same deed, and subjecting the property to the payment of his judgments recovered 2d April, 1855, and exceeding in amount \$9,000.

The two suits were consolidated, as the same proofs were equally applicable in respect to the charge of fraud in the execution of the conveyance sought to be set aside. The court below decreed that the deed was fraudulent as against creditors, and directed the property to be sold, and the proceeds brought into court for distribution. The case is here on an appeal from that decree.

At the date of the deed of October, 1854, Callan was heavily in debt—several suits impending over him and maturing to judgments, to which the property in question would have been subject. The conveyance was made to a brother, for the consideration, as stated in the deed, of \$4,900. The premises conveyed, according to the

estimate of witnesses who were well acquainted with them, [* 479] were worth at the time exceeding \$15,000, assuming the title to be good, which will be noticed hereafter. The vendor continued to possess and occupy the property after the conveyance the same as before, leasing the buildings and collecting the rents in his own name, and not accounting to the vendee for the same. Indeed, the vendee seems to have taken no part in the man-

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agement of the property; nor does it appear that he has exercised any act of ownership over it since the purchase, and down to the taking of the proofs in these cases.

In the answer of Callan, the vendor, to the bill of Statham and others, to the charge that the consideration mentioned in the deed was not paid, he simply states that it had been fully paid by his brother, the vendee. The vendee, for his answer, adopts the answer of his co-defendant.

In their answer to the bill of Sherman, they concur in stating that \$4,000 of the consideration were paid by the surrender of a note the vendee held against the other party, and \$900 in cash, and that the payment was not made in presence of any third person.

No proof was given by the defendants in respect to the payment of the consideration, with a view of sustaining the allegation in the answers. They rely entirely upon the rule of pleading, that the answers are responsible to the bill, and to be taken as true till overthrown by proof on the other side. As they aver the payment was a transaction between themselves, and the principal part a note held by the vendee, which he surrendered, the evidence in respect to which is therefore exclusively within their own knowledge, it would have been more satisfactory if they had given some proof in support of the answers, especially when there were other accompanying circumstances, tending to excite distrust and suspicion as to the *bona fides* of the deed.

As it respects the defect in the title relied on to reduce the value of the property, it appears that J. F. Callan, in November, 1840, took a lease of this property from one W. Robinson, trustee of Alice Jennings, Alice joining in the lease for the term of her natural life, for the annual rent of \$200; and in which lease it is agreed that, upon the death of the said *Alice, the [* 480] lessee shall have the right to purchase the estate for the price of \$3,000; upon the payment of which, Robinson binds himself and his heirs to convey the title. Alice died in May, 1851, and Robinson some years earlier.

It is insisted, on the part of the defendants, that the heirs of Robinson, and also of Alice, refuse to carry into execution this contract, and have refused to accept the \$3,000. There is some obscurity upon the evidence, as it respects the precise state of this question at the time of the deed from Callan to his brother in October, 1854. It is claimed on the part of the judgment creditors that this money had been paid, and that the deed from the heirs was kept back, in fraud of their rights. Perhaps the better opin-

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ion is, upon the facts, that the money has not been paid, and that the property is subject to this encumbrance. It is clear, however, that there is no serious embarrassment in the way of clearing the title on payment of the money.

It appears, by some arrangement, not particularly explained, with the heirs, after the death of Alice, Callan agreed to pay the interest on the \$3,000, and which has been paid down to the month of July, 1854; and the case shows that, upon the payment of the purchase money, with the interest, from the period last mentioned, the title can be obtained. It would have been remarkable if this right of purchase had not been preserved, as it appears Callan has put on the property improvements to the amount of from \$7,000 to \$10,000.

The question as to the title is only important as entering into the estimate of the value of the property, and as tending to rebut the undervaluation of the price, as charged in the bill. It is clear, however, admitting the property to be subject to the payment of \$3,000, that the price was considerably below its true value.

But, independently of this consideration, there are other facts in the case that may well justify the decree below—the most important, perhaps, the unsatisfactory evidence on the part of the Callans in respect to the payment of the consideration stated in the deed.

This proof was vital, in order to uphold a deed in other [* 481] respects surrounded with suspicion. The *evidence was in their possession; and their admission that the transaction was secret made the proof still more indispensable on their part. The want of it, under the circumstances, is nearly if not quite fatal to the validity of the deed as against creditors.

The continuance of the vendor in the possession and occupation and full enjoyment of the premises, the same after the deed as before, and absence of interest in the subject manifested by the vendee, are circumstances not satisfactorily explained; also, the heavy indebtedness of J. F. Callan, and suits pending and maturing to judgment—all well known to the vendee.

We are satisfied the decree of the court below is right, and should be affirmed.

JOHN CLIFTON, Appellant, v. W. H. SHELDON.

23 H. 481.

JURISDICTION ON APPEAL AS TO AMOUNT.

Where a decree in admiralty for the owner of the vessel was for \$2,338.06 for his freight, but \$583.84 was against one defendant and \$1,754.22 against the other, and

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the latter alone appealed, ~~the case must~~ be dismissed—because: 1. The decree is several, and neither of the sums awarded exceed \$2,000. 2. Because if it could be held to be a joint decree, but one defendant has appealed.

APPEAL from the circuit court for the southern district of New York.

Mr. Donohue supported the motion to dismiss on behalf of appellee.

Mr. Owen opposed it.

* *Mr. Justice NELSON* delivered the opinion of the court. [*483]

This is an appeal from a decree of the circuit court of the United States for the southern district of New York, in admiralty. A motion has been made, on the part of the appellee, to dismiss the appeal, for the want of jurisdiction.

A libel was filed by Clifton, in the district court, to recover freight on the two hundred and sixty-nine bales of cotton and nine bags of wool. Brower and Sheldon appeared as claimants, and contested the claim for the freight. Brower claimed sixty-seven of the two hundred and sixty-nine bales, and Sheldon two hundred and two bales. The district court dismissed the libel.

On appeal to the circuit court, this decree was reversed, and decree rendered in favor of the libelant for the amount of the freight, \$2,338.06; that J. W. Brower, claimant of a portion of the cotton, pay to the libelant the sum of \$583.84, being the freight on the cotton claimed by him in the suit, and that the *claimant, W. H. Sheldon, pay for the portion claimed [*484] by him the sum of \$1,754.22. Sheldon appealed from the decree to this court.

The motion is now made to dismiss the appeal, on the ground that the decree against Sheldon is less than \$2,000, and which is apparent from a perusal of the decree. The sum decreed against him is only \$1,754.22.

The freight was separately awarded against the claimants, in proportion to the cotton shipped by each one. The rights of each were distinct and independent.

But if it were otherwise, and the whole of the freight jointly against the claimants, the appeal must still be dismissed, as then the claimants should have joined in it.

Motion to dismiss granted.

Green v. Custard.

THOMAS J. GREEN, Plaintiff in Error, v. WILLIAM CUSTARD.

23 H. 484.

JURISDICTION OF CIRCUIT COURTS UNDER SECTIONS 11 AND 12 OF THE JUDICIARY ACT.

When a cause has been removed from a State to a federal court under the 12th section of the judiciary act, the jurisdiction is not defeated because it turns out that the cause of action is one which could not have been originally brought in the circuit court by reason of the exception in section 11 of that act.

WRIT of error to the circuit court for the western district of Texas. The necessary facts to understand the case are stated in the opinion.

Mr. F. P. Stanton, for plaintiff in error.

No counsel for defendant.

[* 485] * Mr. Justice GRIER delivered the opinion of the court.

This case originated in the district court for the county of McLennan, in the State of Texas, where Custard had instituted his suit against Green by attachment, claiming to recover from him the balance due on a judgment entered on a mortgage given by Green to one Arthur, on lands in California. Green appeared, and moved to have his cause removed to the district court of the United States, he being a citizen of Massachusetts, and Custard a citizen of Texas—the case coming clearly within the provisions of the 12th section of the judiciary act of 1789.

It is probably because this case originated in a State court, that the court below permitted the counsel to turn the case into a written wrangle, instead of requiring them to plead as lawyers, in a court of common law. We had occasion already to notice

[* 486] * the consequences resulting from the introduction of this hybrid system of pleading (so-called) into the administration of justice in Texas. (See *Toby v. Randon*, 11 How. 517, and *Bennet v. Butterworth*, 11 How. 667, with remarks on the same in *McFaul v. Ramsey*, 20 How. 525.) This case adds another to the examples of the utter perplexity and confusion of mind introduced into the administration of justice, by practice under such codes.

Without attempting to trace the devious course of demurrers, replications, amendments, &c., &c., which disfigure this record, it may suffice to say that the plaintiff, beginning, after some time, to discover that he could not recover on his original cause of action, among other amendments set forth an entirely new cause of action, to wit, a note given by Green, payable to "Arthur or order," for \$5,000, without any indorsement or assignment by Arthur to

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plaintiff, but which Custard alleged he had obtained "*in due course of trade.*"

After further demurrers, exceptions, &c., &c., and after taking testimony in California, wholly irrelevant to any possible issue in the case, the record exhibits the following judgment:

"And now on this day came the parties by their attorneys, and the court being now sufficiently advised upon the questions submitted, is of opinion that the judgment, the original cause of action in this case, is not conclusive—in fact, is a nullity; but because the parties plaintiff have amended their petition herein, setting forth the note the base of said judgment, and as it has become a part of the pleadings in this case, and the court being of the opinion that, upon the note, the court is debarred from entertaining the case further in this court, for want of jurisdiction, it is therefore considered by the court that the cause ought to be remanded. It is therefore ordered and decreed that this case, with all the papers belonging to the same, be and is hereby remanded to the district court of McLennan county for further action."

So far as this judgment treats the original cause of action "as a nullity," it could not be objected to; and perhaps the same remark might have equally applied to the amended portion. But the conclusion, that the court had no jurisdiction to proceed further, and the order to remand the case to the State court to try the other half of it, is a clear mistake, for which the judgment must be reversed.

If Green had been a citizen of Texas, and Custard had claimed a right, as indorsee of a citizen of Texas, to bring his suit in the courts of the United States, because he (Custard) was a citizen of another State, the case would have occurred which is included in the proviso to the 11th section of the act which restrains the jurisdiction of the court. But the United States court had jurisdiction of this case, by virtue of the 12th section. It is a right plainly conferred on Green, a citizen of Massachusetts, when sued by a citizen of Texas, in a State court of Texas, no matter what the cause of action may be, provided it demand over five hundred dollars. The exception of the 11th section could have no possible application to the case.

Let the judgment be reversed, and the case remanded for further proceedings.

The City of New York v. Ransom.

THE CITY OF NEW YORK, Plaintiff in Error, v. FRANKLIN RANSOM and another.

23 H. 487.

PATENT LAW—RULE OF DAMAGES.

1. Where a plaintiff has furnished the jury no proper evidence of the damages sustained by an infringement of his patent, an instruction should be given when prayed which restricted the recovery to nominal damages.
2. The rule of damages for the use of an attachment to a fire-engine is not the value of the increased power given, or the saving to a city by the use of it, but the price at which the invention sells to others, or what would be a fair price if no sales had been made.

WRIT of error to the circuit court for the southern district of New York. The case is fully stated in the opinion.

No appearance for plaintiff in error.

Mr. Keller, for defendant.

[*488] *Mr. Justice GRIER delivered the opinion of the court.

The plaintiffs in error were defendants in an action for infringement of a patent, "for a new and useful improvement in the mode of applying water to fire-engines so as to render their operation more efficient."

On the trial, they took some twenty-four exceptions to the rulings of the court in their charge to the jury; but they have not seen fit to appear in this court, and point out to us on which of these numerous exceptions they principally rely for the reversal of the judgment. The defendants in error have not elected to have the writ of error dismissed for want of prosecution, but have filed a printed argument praying for an affirmance of the judgment.

On examination of the record, we find that the bill of exceptions contains no copy of the specification of the letters patent. Without this, we are unable to test the correctness of the construction of the patent by the court below.

But there is one exception which the record enables us to examine, and in which we think there is error.

The defendants' fourteenth prayer for instruction is as follows:

"The plaintiffs have furnished no data to estimate actual damage, and therefore in no aspect of the case can they recover more than nominal damages."

If the predicate of this proposition be true, the conclusion was correct, and the instruction should have been given by the court.

Where a plaintiff is allowed to recover only "actual damages,"

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he is bound to furnish evidence by which the jury may assess them. If he rest his case, after merely proving an infringement of his patent, he may be entitled to nominal damages, but no more. He cannot call on a jury to guess out his case without evidence. Actual damages must be calculated, not imagined, and an arithmetical calculation cannot be made without *certain* data on which to make it.

The invention in this case was not one which enabled the patentee to make a profit by a monopoly of its use. Nor was it a separate and distinct machine, by the sale of which he * could make a profit. The patent is for an improvement [* 489] in the apparatus of the common fire-engine, by which the hydrostatic pressure of the water from the hydrant may be combined with the hydraulic pressure of the engine, and thus add to its power and efficiency. There was evidence tending to show the invention to be valuable, and that it could be applied to the engines in use at an expense of twenty-five dollars, thereby greatly increasing the power of the machine. It was proved that the city had applied this invention to fifty engines, but no information whatever of the price or value of a single license is given in the bill; fifty is the coefficient by which an unknown number is to be multiplied, and without further data the result is still an unknown quantity. If there had been any proof that the selling price of a single license for a single engine was four hundred dollars, the jury would have had something to support their verdict for \$20,000.

In the case of *Seymour v. McConnel*, (16 Howard, 485,) it was decided by this court, that where the profit of the patentee is derived neither from an exclusive use of the thing patented, nor from a monopoly of making it for others to use, the actual damage which he suffers by the use of his improvement without his license, is the price of it, with interest, and no more. It is to his advantage that every one should use his invention, provided he pays for a license. The only damage to the patentee is the non-payment of that sum when the infringer commences the use of the invention.

As the plaintiffs in this case did not furnish any evidence upon which to found a calculation of actual damages, the court should have instructed the jury as requested by the counsel. Instead of it, the court instructed the jury as follows:

"If the invention is valuable, if by its use the power and efficiency of the fire-engines belonging to the defendant are so increased, that fifty engines used with this improvement are equal in practical effect to seventy-five, or any other number of engines, used without this improvement, the jury are at liberty to infer, if

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they think the inference a just one, that the defendant, in [* 490] its corporate capacity, has saved the cost * of the purchase and operation of the additional number of engines which would have been required to produce the same result if this invention had not been used; and that the corporate authorities, if they had admitted the plaintiffs' rights, would have paid the amount of this additional cost, or a large portion of it, as the consideration for a license to use this invention, rather than to abandon its use; and that the plaintiffs have therefore lost by the infringement what the defendant would have so paid to secure such license. It is for this reason that the benefits received by the defendant in its corporate capacity, from the use of the invention, in the consequent reduction of its expenditures for fire-engines, and their management and operation, are proper subjects for consideration in determining the plaintiffs' damages; and the jury must determine for themselves, upon the consideration of this and the other facts of the case, (if they find that the plaintiffs are entitled to recover,) what damages have been actually sustained by the plaintiffs in consequence of the unauthorized and wrongful acts of the defendant, being careful only to give the actual damages proved, and not to speculate upon the possibility or even probability of damages beyond such as are proved to have been sustained by the plaintiffs."

It was of little use to caution the jury from giving speculative or any other than "actual damages," after the large margin of inference and presumption which they were permitted to take in order to find data by which to calculate them.

It was said, in the case to which we have referred, "actual damages should be actually proved, and cannot be assumed as a legal inference from facts" which afford no data by which they can be calculated.

In order to find out the plaintiffs' loss or damage, the jury were allowed by the court to *infer* that the defendants have saved all the money indicated by the comparative powers of the engines with and without the improvement; and after having made this inference, they may *presume* that the defendants would have paid this amount to the plaintiff for the use of his improvement.

Thus the possible advantage or gain made by the use of [* 491] * plaintiffs' improvement on their machines, is made the measure of his loss. If the plaintiffs, unable to furnish any other data for a calculation, had proved that the defendants had made a certain amount of money by putting out the fires in New York, which the plaintiffs would otherwise have made by use

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of their invention, he might with some reason contend that this was a proper measure.

But if he fails to furnish any evidence of the proper data for a calculation of his damage, he should not expect that a jury should work out a result for him by inferences or presumptions founded on such subtle theories.

We therefore direct the case to be remanded for a *venire facias de novo*.

GEORGE B. MOREWOOD and others, Appellants, v. LORENZO N. ENEQUIST.
23 H. 491.

ADMIRALTY—JURISDICTION OF CONTRACTS OF AFFREIGHTMENT AND CHARTER-PARTY.

1. This court reasserts the decision of the *New Jersey Steamboat Company v. The Merchants' Bank*, 6 Howard, 334, that the district court sitting in admiralty have jurisdiction of contracts of charter-party and affreightment, which are maritime contracts.
2. Also, that where the district and circuit courts have made the same finding of facts on conflicting testimony, this court will not reverse on a doubt raised by such testimony.

APPEAL from the circuit court for the southern district of New York. The case is sufficiently stated in the opinion.

Mr. Dodge and *Mr. Johnson*, for appellants.

Mr. Donohue, for appellee.

**Mr. Justice GRIER* delivered the opinion of the court. [* 492]

The ship *Gothland*, owned by Enequist, the libellant, was chartered by Burt, Myrtle & Co., of Batavia, to proceed to Padung, on the island of Sumatra, there to receive a quantity of coffee; to return thence to Batavia and complete her cargo, and deliver the same in New York, freight to be paid by the assignees of the bills of lading on delivery of the cargo. The *libellants' suit is *in personam* against the consignees or [* 493] assignees of the cargo, for the amount of freight stipulated in the charter-party.

The only defense alleged in the answer is, that a portion of the merchandise delivered was not in good order, and had been greatly damaged by sweating, caused by want of proper ventilation on the voyage.

This defense was fully discussed and examined both in the district and circuit court, and a decree was entered for the libellant in both.

In the argument in this court, the counsel, without abandoning

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37f	211
37f	212
37f	708

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the original defense, have expended much learning and ingenuity in an attempt to demonstrate that a court of admiralty in this country, like those of England, has no jurisdiction over contracts of charter-party or affreightment. They do not seem to deny that these are maritime contracts, according to any correct definition of the terms, but rather require us to abandon our whole course of decision on this subject, and return to the fluctuating decisions of English common-law judges, which, it has been truly said, "are founded on no uniform principle, and exhibit illiberal jealousy and narrow prejudice."

The errors of those decisions have mostly been corrected by legislation in the country of their origin; they have never been adopted in this.

We do not feel disposed to be again drawn into the discussion of the arguments which counsel have reproduced on this subject. The case of the *New Jersey Steamboat Company v. the Merchants' Bank of Boston* (6 How. 334) was twice argued (in 1847 and 1848) at very great length. The whole subject was most thoroughly investigated both by counsel and the court. Everything connected with the history of courts of admiralty, from the reign of Richard the Second to the present day—everything which the industry, learning, and research of most able counsel could discover, was brought to our notice. We then decided that charter-parties and contracts of affreightment are "maritime contracts" within the true meaning and construction of the constitution and act of [* 494] *congress, and cognizable in courts of admiralty by process either *in rem* or *in personam*.

Lord Tenterden admits that, by the maritime law, "the ship is bound to the merchandise and the merchandise to the ship; and it is a necessary consequence that the contract is as much a maritime contract as a bottomry or *respondentia* bond, or mariners' wages." See Abbott on Shipping. But in England they cannot have the benefit of this lien or privilege, because courts of common law cannot enforce a lien *in rem*, and will not permit the court of admiralty to do it. Our district courts had exercised this jurisdiction without question till the case just mentioned came before this court. Since that time no objection has been raised in this court to the jurisdiction of courts of admiralty over contracts of affreightment. See *Rich v. Lambert*, 12 Howard, 347, &c., &c.

The numerous briefs of argument filed in this case contain nothing which was not brought to our notice in the former discussions of this subject, except some remarks on the case of the *People's Ferry Co. v. Beers*, (20 How. 401.) It has been contended that this case has

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established the doctrine, that the jurisdiction of our courts of admiralty under the constitution should be restrained to that which they were permitted to exercise in the colonies before the revolution. The court decided in that case that a contract to build a ship is not a maritime contract; and though, in countries governed by the civil law, courts of admiralty may have taken jurisdiction of such contracts, yet that in this country they are purely local, and governed by State laws, and should be enforced by their own tribunals. As a cumulative argument, it was stated that the act of congress of 1789 was not intended to conflict with the rights of the State tribunals to enforce contracts governed by their own laws, and not strictly of a maritime nature; that such contracts were thus considered at the time the constitution was formed, and had never been previously cognizable in courts of admiralty as within the category of maritime contracts; and that the contest of jurisdiction in that case "was not so much between rival tribunals as between distinct sovereignties claiming to exercise power over contracts, property, * and personal franchises." The arguments used in stat- [* 495] ing the opinion of the court must be referred to the subject before it, and construed in connection with the question to be decided. They had no reference whatever to any former decisions of this court on the question *now* (it is hoped for the last time) mooted before us.

There is much testimony in the record of this case, on the issue made by the answer, with the usual discrepancy and contradiction in matters of opinion. The question whether the cargo was injured through the negligence and fault of the master, or whether the damage to it was caused by the innate vice of the cargo and its necessary exposure on the voyage, was a very complex one, depending wholly on the opinion of experts. Where witnesses of proper skill and experience have formed their judgment from a personal examination of the subject of the controversy, their opinions are generally more worthy of confidence than those elicited by hypothetical questions, which may or may not state all the accidents and circumstances necessary to form a correct conclusion.

The decision of this case by the district and circuit courts is supported by the testimony of numerous witnesses, who had both the capacity and experience to judge, and had examined the *subject* of the controversy. We see no reason to dispute the correctness of their judgment, or to enter into a particular examination of the conflicting testimony in order to vindicate the correctness of our own. We have frequently said that appellants should not expect

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this court to reverse a decree of the circuit court merely upon a doubt created by conflicting testimony.

The judgment of the circuit court is affirmed with costs.

JOHN YONTZ, Administrator, &c., Appellant, v. THE UNITED STATES.

23 H. 495.

CALIFORNIA LAND GRANTS.

The petition on which the land was granted was for two leagues, according to a plan or diseño furnished. The grant was for land of the extent mentioned in the plan, the surplus to remain for the use of the nation. Held, that the claim could not be confirmed for more than the two leagues, though the plan included a much larger quantity.

APPEAL from the district court for the northern district of California. The case is stated in the opinion.

Mr. Gould and *Mr. Howard*, for appellant.

Mr. Stanton, for the United States.

[* 496] * Mr. Justice CATRON delivered the opinion of the court.

Yontz prosecutes this appeal as administrator of Jose Dolores Pacheco, who died pending the suit below.

There is no controversy in relation to the validity of the grant, but only as respects the quantity confirmed by the district court, being two square leagues. The claimant insists that he is entitled to a survey and patent from the United States corresponding to the out-boundaries embraced in his diseño, and the description given of the rancho in the governor's grant, which recites: "Whereas citizen Jose Dolores Pacheco has sought to obtain for his personal benefit and that of his family the place lying between the 'creek or ravine' of La Tasajera and the place of 'San Ramon,' bounded by the house of the same place of San Ramon down to the 'dead trees,' (palos secos,) and from this point, taking by the 'Tular' to the 'high hill' (Loma Alta) along the creek or ravine of said Tasajera, and along the range of hills (sierra) and the land of citizen Bartolo Pacheco." After which the conditional clause follows, to wit: "The tract of which grant is made is of the extent mentioned in the plan, which goes with the expediente, with its respective boundaries.

The officer giving the possession shall cause it to be measured, according to the *ordinance to mark boundaries; the surplus to remain for the nation for its uses."

Pacheco petitioned Governor Figueroa for two leagues of land, in June, 1834, lying within the boundaries set forth in the foregoing description and plan. He then failed to have his petition favorably considered by the governor, because opposition was made by the mission of San Jose.

On the 30th of November, 1837, Pacheco again petitioned Governor Alvarado to grant him the same land: he says: "At this time I confine the application for two leagues, more or less, according to the boundaries of said mission of San Jose to the south; the plan of which I enclose herein again." The governor referred this second petition to the council of San Jose, and they reported the land to be vacant, and that it could be adjudicated for colonization. On this report the Governor made the grant. It was confirmed by the departmental assembly, May 12th, 1840, with directions, "that the expediente be returned to his excellency the governor, for the proper ends." No final document in consummation of a perfect title issued to the grantee; nor was judicial possession given of the land, and in this unsurveyed condition the claim stood when the United States acquired the country.

If we are bound to take the last paper issued by the governor as concluding all reference to preceding steps in the progress of obtaining a complete title, then we find the grant inconsistent on its face. The argument urged on our consideration is, that there are specific boundaries given as to the extent of the land granted, so that it is clearly a grant of all the land within these prescribed limits. In contravention of this assumption, the clause above recited directs that the officer giving judicial possession shall cause the land to be measured, according to the ordinance, and to mark boundaries; "*the surplus to remain for the nation, for its uses.*" If it be true that the boundaries are conclusively defined in the grant, then no surplus could be thrown off by the survey. But if two leagues are to be surveyed within the larger limits, then the clause is consistent. In the next place, it is insisted that the clause is a condition, * usual in all these grants, and amounts to lit- [* 498] tle more than mere formality. Ascribing to the clause usually declaring quantity only this degree of credence, then we are thrown on the recitals of the grant, and bound to look behind it, to the incipient steps, and to other title papers referred to, and from all these to ascertain how much land was intended to be conceded.

The claimants come before us, presenting an equity; their title not being completed, because the land has never been surveyed, and severed from the public domain. Hanson's case, 16 Peters, 200; Rosa Pacheco's case, now decided.

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We are called on to adjudge what the equities of claimants are ; and to do this, it is proper "to look at all the several parts and ceremonies necessary to complete the title, and to take them together as one act." 10 How. 372.

This court has uniformly held, in cases coming up by appeal from the district courts of Missouri and Florida, which adjudicated Spanish claims under the act of 1824, that the petition to the governor for land and his concession must be taken as one act, and the decree usually proceeded on the petition, which described the land as respected locality and quantity. This was necessarily so, as the concession was often a mere grant of the request, without other description than the petition contained.

And this is manifestly one of the rules of decision governing the tribunals in California, prescribed by the 11th section of the act of March 3d, 1851. In this case the grant refers to the previous steps, (including the petition, asking for only two leagues,) and carries them along with the grant.

From all the acts, taken together, it is manifest that the decree of the district court, restricting the quantity to two square leagues, must be affirmed, if so much land is found within the out-boundaries of the tract of country set forth in the grant and diseño ; otherwise, the less quantity.

THE UNITED STATES, Appellants, v. BERREYESA'S HEIRS.

23 H. 499.

CALIFORNIA LAND GRANT.

1. The genuineness of this grant is fully established by the evidence, and the decree confirming it is affirmed, but no directions will be given here as to its location, because no such question was raised in the court below.

APPEAL from the district court for the northern district of California.

Mr. Stanton, for the United States.

Mr. Gould, for appellees.

Mr. Justice CAMPBELL delivered the opinion of the court.

The appellees were confirmed in their claim to a parcel of land in the county of Santa Clara, known by the name of San Vicente, and being a part of the Canada de los Capitancillos, containing one square league, and adjoining the lands of Justo Larios.

They are the widow and heirs at law of Jose E. Berreyesa, who

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became possessed of the land in 1834, under the authority of the governor, Figueroa, and occupied it with his family, until 1842. In that year he presented a petition to the governor, representing these facts, and complained that his neighbor Larios had disturbed his enjoyment and repose, and desired that there might be granted to him two sitios, from the house of Larios to the Matadera, with all the hills that belong to the Canada. He says that he served the country in the army for twenty-four years and upwards, without receiving pay, and that he had with him eleven children.

A reference was made of the petition to the justice of the pueblo, who called Larios before him, and an agreement was then made between the parties in reference to the division line.

*This report was returned to the governor, who directed [* 500] that a title should issue to the applicant, and that the expediente be remitted to the departmental junta, for its approval. The decree and titulo describe a parcel of land included within natural boundaries; but in the conditions, it is confined to a single league in quantity.

Subsequently to this, Berreyesa complained to the governor of the limitation, insisting that his petition had been for two leagues, and that he had returned the grant to have it corrected. The governor directed the proper inquiries, and the result was to concede the prayer of the petitioner; but, for some reason, the grant did not issue.

The board of commissioners confirmed the claim of the petitioners for one square league; and this decree was confirmed by the district court on appeal, and it ordered the land to be located, according to the description and within the boundaries set out in the original grant, and delineated in the map contained in the expediente, to both of which reference is made for a more particular description. The genuineness of this grant and the fulfillment of the conditions are fully established, and the validity of the claim is unquestionable.

The appellees have requested the court to give instructions relative to the location and survey of this grant, similar to those found in the case of the *United States v. Fossatt*, 20 Howard. But no question was decided in the court below upon the location of the lines of the tract, and it would be irregular for this court to assume that the action of the court will not conform to the established rules on the subject. The decree of the district court has not been called in question by the appellees; and should any difficulty arise in the location of the grant, it will be competent for the appellees to invoke the aid of that court.

Decree affirmed.

Gridley v. Wynant.

RUEL C. GRIDLEY and others, Appellants, v. DAVID WYNANT.

23 H. 500.

EQUITY—TRUSTS—MARRIED WOMEN AS TRUSTEES.

1. A married woman may receive and convey title to land without joining her husband, provided no right of his, legal or equitable, is affected by the conveyance.
2. The fact that the conveyance to her in trust for her son in law was made to defraud his creditors, gives her heirs no right to question the title of an innocent purchaser for value from her.

APPEAL from the district court for the district of Iowa. The matter decided is fully stated in the opinion.

Mr. Grant, for appellants.

Mr. Smith, for appellee.

[* 501] * Mr. Justice CAMPBELL delivered the opinion of the court.

The appellee filed this bill to enjoin the appellants from prosecuting a suit to recover a parcel of land in his possession and to quiet his title against their claim as heirs at law of Sarah A. Blakely, deceased. He charges in his bill that he purchased the land from William B. Beebe, and paid to him the purchase money, and that Mrs. Blakely made him a deed at the request of Beebe, who was her son in law, and for whose use and benefit it had been conveyed to her with her consent. At the time of her conveyance she was a married woman, and the bill avers that by error, ignorance, or oversight, her husband failed to join in her deed.

The defendants admit that they claim as heirs at law of Mrs. Blakely, and insist that she was under a disability to convey land without the consent of her husband.

They deny that she held the land in trust for Beebe, but insist that even if that were the case the trust was illegal, for [* 502] * that Beebe was an insolvent debtor, and the sole design of such a conveyance was to defraud and delay his creditors.

They object that Beebe is a necessary party in the cause. The district court granted relief according to the prayer of the bill. The testimony sufficiently establishes the case made by the bill. It appears that Beebe purchased the land from the tenants in fee simple, and that it was conveyed to Mrs. Blakely by his directions, and that this was done because he was in debt, and did not desire the exposure of his property.

That he sold the land to the appellee, and that Mrs. Blakely executed to him titles without joining her husband in the conveyance.

The question arises, whether the heirs at law of Mrs. Blukely can contest the validity of her conveyance. There is no incapacity in a married woman to become a trustee, and to exercise the legal judgment and discretion belonging to that character. A trustee in equity is regarded in the light of an instrument or agent for the *cestui que trust*, and the authority confided to him is in the nature of a power. It has long been settled that a married woman may execute a power without the co-operation of her husband. Sug. on Pow., 181. Some doubt has been expressed whether, at law, a married woman could convey an estate vested in her in trust, and inconveniences have been suggested as arising from her asserted incapacity to make assurances which a court of law would recognize as valid. And it has been determined that she could not defeat a right of her husband or impose a legal responsibility upon him, by her unassisted act. Lewen on Trusts and Trustees, pp. 89, 90; Sug. on Pow. 192, 196; 2 Spence Eq. 31. But within the scope of her authority a court of equity will sustain her acts, and require those whose co-operation is necessary to confirm them. In the present instance, her deed was within the scope of her authority and duty. She did not defeat an estate to which her husband was equitably entitled, nor does he claim adversely to it. The complainants are her own children, her heirs at law, who are seeking to divest of his estate a *bona fide* purchaser, and to acquire one for themselves—one to which their mother had no claim in equity or good conscience. Nor can the appellants avail themselves of the *illegality of the consideration on which their [*503] mother became the trustee for Beebe. The trust has not only been constituted, but carried into execution. The appellee is not a mere volunteer seeking to enforce its terms, nor does his equity depend upon the validity of the trust for its support. He has an independent equity, arising from his purchase from persons professing to hold a legal relation to each other and to the subject of the contract, and to enforce his right there is no need for any inquiry into the consideration or motives that operated upon these parties to assume their relation of trustee and *cestui que trust*. In such a case, equity does not refuse to lend its assistance. *McBlair v. Gibbes*, 17 How. 232.

The objection that Beebe is a necessary party to the bill cannot be supported. Beebe has not claimed adversely to the title of the appellee. The legal title has never been invested in him, nor do the appellants recognize any privity or connection with him. They claim the property discharged of any equity either in his favor or that of the appellee.

Gridley v. Westbrook.

Upon the whole case, the opinion of the court is in favor of the appellee, and the decree of the district court is affirmed.

RUEL GRIDLEY and others, Appellants, v. EDWIN S. WESTBROOK
and JAMES P. GUAGER.

23 H. 503.

PRACTICE IN EQUITY IN CASES REMOVED FROM STATE COURTS.

1. Where, in cases removed from the State courts of an equitable character, the pleadings and other proceedings have been according to the State code of practice, this court will decide the case on the merits, when they can be seen from the record.
2. A trustee *feme covert* may, under the circumstances mentioned in the preceding case, make a valid power of attorney to her son in law to convey, and when well executed it will carry the title.

APPEAL from the district court for the district of Iowa.

Mr. Grant, for appellants.

Mr. Wilson, for appellees.

[* 504] * Mr. Justice CAMPBELL delivered the opinion of the court.

This suit was commenced in the district court of Jackson county, Iowa, by the appellees, under articles 2025 and 2026 of the code of Iowa, to quiet their title and possession to certain lands in that county against the impending and adverse claim of the appellants, the heirs at law of Sarah A. Blukely, deceased.

The appellants appeared, and answered the petition, and procured the removal of the cause to the district court of the United States for Iowa, under the 12th section of the judiciary act of September, 1789. After the removal of the suit to the district court, the appellants commenced a cross-suit, asserting therein their own title to the land in controversy, and praying for a decree of delivery of the possession to them, and an account of the mesne profits. The original and cross-suit were "consolidated" on the motion of the appellants, and were heard as one suit.

The proceedings in these causes seem to have been framed upon the course of practice prevailing under the code of Iowa; and we have found some difficulty in entertaining the suit, as not conforming to the mode of proceeding prescribed for courts of the United States in chancery proceedings; but as we are enabled to ascertain, from the pleadings and proofs, the matter in dispute between the parties, we shall proceed to adjudicate the questions they present.

The facts disclosed by the proofs show that William B. Beebe,

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an insolvent debtor, in order to carry on business without interruption, made purchases and sales of property on his own account, in Iowa, but under the shelter of the name of Sarah A. Blakely, the mother of his wife, a resident of Missouri. To enable him to do so with facility, he procured from her powers of attorney, which conferred authority for that purpose.

* The land described in the petition was purchased by [* 505] Beebe with his own money, and the titles were made for his use to Mrs. Blakely. Subsequently he sold them to one of the parties to the cross-suit (Mrs. Wells) for a valuable consideration, and, as attorney in fact for Mrs. Blakely, executed to her a deed; and the appellees, Westbrook and Guager, claim as purchasers from this person.

At the time of the execution of the deed of Mrs. Blakely, and of her death, she was a *feme covert*. The appellants insist, that the conveyance to Mrs. Wells in the name of Mrs. Blakely is void, and that they are entitled to hold the lands as heirs at law.

We discover no material variation between the principles applicable in this cause and that of the same appellants and Wynant, which we have just decided. Upon the authority of that case, we determine that the decree of the district court must be affirmed.

THE STATE OF ALABAMA, Complainant, v. THE STATE OF GEORGIA.

23 H. 505.

BOUNDARY BETWEEN GEORGIA AND ALABAMA.

The point in dispute is, whether the boundary is the *western bank* of the Chattahoochee river or the low-water mark of the west side of that river. This depends on the construction of the line described in the treaty of cession by Georgia to the United States, to wit: "west of a line beginning on the western bank of the Chattahoochee river, where the same crosses the boundary between the United States and Spain, running up said river and along the western bank thereof." Held, that the western bank is the boundary line, that the jurisdiction of the bed of the river is in Georgia, and includes all that part of the soil which is alternately covered and left bare, and which is adequate to contain it at its average and mean stage during the entire year.

THIS was a bill in chancery in this court as of its original jurisdiction. It was brought by the State of Alabama to establish the boundary line with precision between that State and the State of Georgia. The whole case is well stated in the opinion.

It was argued by *Mr. Dargan* and *Mr. Phillips*, for complainant.

Mr. McDonald and *Mr. Gibson*, for the State of Georgia.

[* 510] *Mr. Justice WAYNE delivered the opinion of the court.
This case involves a question of boundary between the States of Alabama and Georgia.

Alabama claims that its boundary commences on the west side of the Chattahoochee river at a point where it enters the State of Florida; from thence up the river along the low-water mark, on the western side thereof, to the point on Miller's Bend, next above the place where Uchee creek empties into such river; thence in a line to Nickajack, on Tennessee river.

Georgia denies that the line intended by the cession of her western territory to the United States runs along the usual low-water mark of the perennial stream of the Chattahoochee river, but that the State of Georgia's boundary line is a line up the river, on and along its western bank, and that the ownership and jurisdiction of Georgia in the soil of the river extends over to the water-line of the fast western bank, which, with the eastern bank of the river, make the bed of the river.

[* 511] *The difference between the two States must be decided by the construction which this court shall give to the following words of the contract of cession: "*West of a line beginning on the western bank of the Chattahoochee river, where the same crosses the boundary between the United States and Spain, running up the said river and along the western bank thereof.*"

In making such construction, it is necessary to keep in mind that there was by the contract of cession a mutual relinquishment of claims by the contracting parties, the United States ceding to Georgia all its right, title, &c., to the territory lying east of that line, and Georgia ceding to the United States all its right and title to the territory west of it.

We believe that the boundary can be satisfactorily determined and run in this suit, from the pleadings of the parties, notwithstanding their difference as to the locality and direction of it on the Chattahoochee river.

Georgia is interrogated in certain particulars in the bill, which the complainant thinks will produce answers illustrative of the right of Alabama to the boundary which is claimed. Georgia answers them separately, having previously given a correct and literal copy of the contract. It is as follows: "The State of Georgia cedes to the United States all the right, title, and claim, which the State has to the jurisdiction and soil of the lands situated within the boundaries of the United States south of the State of Tennessee, and west of a line beginning on the western bank of the Chattahoochee river, where the same crosses the boundary line

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between the United States and Spain ; running thence up the said river Chattahoochee, and along the western bank thereof, to the great bend thereof, next above the place where a certain creek or river called Uchee (being the first considerable stream on the western side above the Cussetas and Coweta towns) empties into the said Chattahoochee river ; thence in a direct line to Nickajack, on the Tennessee river ; thence crossing the said last-mentioned river ; and thence running up the said Tennessee river, and along the western bank thereof, to the southern boundary line of the State of Tennessee."

In answer to the first question, Georgia admits what is *alleged in the bill in relation to the definition of the [* 512] boundaries of the territory of Alabama by an act of congress, passed in eighteen hundred and seventeen, and the subsequent grant of admission of the State of Alabama into the Union with the same boundaries in the year eighteen hundred and nineteen ; and the conclusion from it is, simply, that the eastern boundary line of Alabama is the western boundary line of Georgia, but that, so far as that line runs along the western bank of the Chattahoochee river, Georgia denies that it runs along the usual or low-water mark ; but, on the contrary, Georgia contends that it runs along the western bank at high-water mark, using high-water mark in the sense of the highest water-line of the river's bed ; or, in other words, the highest water-line of that bed, where the passage of water is sufficiently frequent to be marked by a difference in soil and vegetable growth.

Georgia also answers affirmatively the other interrogatory in the bill with the same qualification, that what she claims is a right to exercise jurisdiction over all the lands up to the water-line of the western bank of the river's bed.

Georgia also says, that while she regards the description of the banks of the river given in the bill as highly drawn, she admits it to be more applicable to the southern part of the bank than to that part of it sixty or seventy miles above the thirty-first degree of north latitude. It is admitted that in some places the banks are flat, but that in other places, especially in the upper portion of the river, the banks are generally steep and well defined, so much so as to be familiarly known as the "Bluffs of the Chattahoochee;" and that the banks of the river in a number of places along the dividing line between the two States are low and flat, and that in freshets the water spreads as far as half a mile beyond the line to the west, and in a few places further than the western line of the

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river's bed, over low lands, which Georgia does not claim to be under its jurisdiction.

These declarations and admissions upon the part of Georgia simplify the controversy, and narrow it to the claim of the respective parties as heretofore set forth.

The contract of cession must be interpreted by the words [* 513] * of it, according to their received meaning and use in the language in which it is written, as that can be collected from judicial opinions concerning the rights of private persons upon rivers, and the writings of publicists in reference to the settlement of controversies between nations and States as to their ownership and jurisdiction on the soil of rivers within their banks and beds. Such authorities are to be found in cases in our own country, and in those of every nation in Europe.

Woodrych defines a river to be a body of flowing water of no specific dimensions—larger than a brook or rivulet, less than a sea—a *running stream, pent on each side by walls or banks.*

Grotius, ch. 2, 18, says a river that separates two jurisdictions is not to be considered barely as water, but as water confined in such and such banks, and running in such and such channel. Hence, there is water having a bank and a bed, over which the water flows, called its channel, meaning, by the word channel, the place where the river flows, including the whole breadth of the river.

Bouvier says banks of rivers contain the river in its natural channel, where there is the greatest flow of water.

Vattel says that the bed belongs to the owner of the river. It is the running water of a river that makes its bed; for it is that, and that only, which leaves its indelible mark to be readily traced by the eye; and wherever that mark is left, there is the river's bed. It may not be there to-day, but it was there yesterday; and when the occasion comes, it must and will—unobstructed—again fill its own natural bed. Again, he says, the owner of a river is entitled to its whole bed, for the bed is a part of the river.

Mr. Justice Story, in *Thomas and Hatch*, 3 Sumner, 178, defines shores or flats to be the space between the margin of the water at a low stage, and the banks to be what contains it in its greatest flow; Lord Hale defines the term shore to be synonymous with flat, and substitutes the latter for that expression. Mr. Justice Parker does the same, in 6 Mass. Reports, 436, 439.

Chief Justice Marshall says the shore of a river borders [* 514] on * the water's edge; and the rule of law, as declared by the court in 5 Wheat. 379, is, that when a great river

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is a boundary between two nations or States, if the original property is not in either, and there be no convention about it, each holds to the middle of the stream.

Virginia, in her deed of cession to the United States of the territory northwest of the Ohio, fixed the boundary of that State at low-water mark on the north side of the Ohio; and it remains the limit of that State and Kentucky, as well as of the States adjacent, formed out of that territory. 3 Dana Kentucky Reports, 278, 279; 5 Wheaton, 378; Code of Virginia, 1849, pp. 49, 34; 1 St. Ohio, 62. By compact between Virginia and Kentucky, the navigation is free. A like compact exists between New York and New Jersey, as to the Hudson river and waters of the bay of New York and adjacent waters.

Webster's definition of a bank is a steep declivity rising from a river or lake, considered so when descending, and called acclivity when ascending.

Doctor Johnson defines the word bank to be the earth arising on each side of a water. We say properly the shore of the sea and a bank of a river, brook, or small water. In the writings of our English classics, the two words are more frequently used in those senses; for instance, as when boats and vessels are approaching the shore to communicate with those who are upon the banks.

Bailey, in his edition of the Universal Latin Lexicon of Facciolatus and Forcellinus, says that *ripa*, the bank of a river, is *extremitas terræ quod aqua alluitur et proprie dicitur de flumine; ut litus de mare, nam hoc depressum est declive atque humile, ripa altior fere est præruptior*; and again, *ripa recte definitur id quod flumen continet, naturalem vigorem cursus sui tenens*.

Notwithstanding that there are differences of expression in the preceding citations, they all concur as to what a river is; what its banks are; that they are distinct from the shore or flat, and as to what constitutes its channel.

With these authorities and the pleadings of this suit in view, all of us reject the low-water mark claimed by Alabama

* as the line that was intended by the contract of cession [* 515] between the United States and Georgia. And all of us concur in this conclusion, that by the contract of cession, Georgia ceded to the United States all of her lands west of a line beginning on the western bank of the Chattahoochee river where the same crosses the boundary line between the United States and Spain, running up the said Chattahoochee river and along the western bank thereof.

We also agree and decide that this language implies that there

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is ownership of soil and jurisdiction in Georgia in the bed of the river Chattahoochee, and that the bed of the river is that portion of its soil *which is alternately covered and left bare, as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during the entire year, without reference to the extraordinary freshets of the winter or spring, or the extreme droughts of the summer or autumn.*

The western line of the cession on the Chattahoochee river must be traced on the water-line of the acclivity of the western bank, and along that bank where that is defined; and in such places on the river where the western bank is not defined, it must be continued up the river on the line of its bed, as that is made by the average and mean stage of the water, as that is expressed in the conclusion of the preceding paragraph of this opinion.

By the contract of cession, the navigation of the river is free to both parties.

JUAN M. and JOSE LEANDRO LUCO, Appellants, v. THE UNITED STATES.

23 H. 515.

CALIFORNIA LAND GRANT.

In this case the claim was rejected by the board of commissioners and by the district court, and, on appeal, this court, on a thorough examination of the claim, rejects the pretended grant as founded solely on fraud and forgery.

APPEAL from the district court for the northern district of California. The facts are very fully stated in the opinion.

Mr. Benham, and *Mr. Cushing*, for appellants.

Mr. Stanton and *Mr. De La Torre*, for the United States.

[* 532] * Mr. Justice GRIER delivered the opinion of the court.

The appellants, Juan Manuel Luco and Jose Leandro Luco, filed their petition with the board of commissioners for ascertaining and settling land claims in California, on the 13th of September, 1854. This was after the time limited by the act of Congress of 1851. But, on their application, Congress passed a special act (July 17, 1854) authorizing the presentation of their claim.

They claim under a grant made to one Jose de la Rosa, dated 4th of December, 1845, and purporting to be signed by Pio Pico, as acting governor, and countersigned by Jose Maria Covarrubias,

secretary. This document was deposited in the surveyor general's office on the 25th of October, 1853, and had attached to it a paper, purporting to be a petition, by Jose de la Rosa to the governor, setting forth that the government was indebted to him in the sum of \$4,650 for services as printer, and praying for the *sobrante*, or lands remaining between certain ranches of Vallejo and others.

The boundaries of the land prayed for are set forth very * distinctly, but without any limitation as to the quantity [* 533] of land contained therein. On the margin of this petition is the usual order for title, purporting to be signed by Pio Pico on 8th of November, 1845.

There is also attached a paper, purporting to be a certificate of approval by the departmental assembly, certified by the signatures of Pio Pico and Jose M. Covarrubias, and dated 18th of December, 1845.

This grant is for land within certain boundaries, and unrestricted as to quantity. Its confirmation was vigorously opposed by the counsel for the government. They alleged that the documents produced to support the claim were forgeries, supported by perjuries of persons who had conspired to defraud the government of an immense body of valuable land. Upon this issue the parties went to trial before the commissioners, who found in favor of the United States. The case went by appeal to the district court, where much additional testimony was taken, a thorough investigation made, and these documents were again adjudged to be forgeries.

The appeal to this court compels us, however unpleasant the task may be, to pass upon this issue of fact, in which the character and conduct of others, besides the parties, will necessarily be made the subjects of discussion.

This claim first made its appearance in 1853, after the lands had been surveyed by the United States government as vacant. Previous to such survey, the public officers had used every diligence to discover whether any person possessed any title or claim to these lands, but the inhabitants of the district, and the owners of adjoining lands, were all ignorant of any claim, by possession, grant, or otherwise.

The lands within the boundaries of this alleged grant amount to 270,000 acres, or thereabouts.

The person to whom the grant purports to have been made was almost a pauper, and though not actually a servant, yet a dependent of General Vallejo, residing in Sonoma, gaining a precarious livelihood by making and mending clothes and tinware, acting as alcalde, printer, gardener, surveyor, music teacher, and attending

[* 534] to a grocery and billiard table for * Vallejo; and during all this time, from the date till the public appearance of this title, wholly unaware of his wealth and immense possessions, and always representing himself as a poor man, while he had in his possession a title to 270,000 acres of valuable land.

The archives of the Mexican government furnish not the slightest trace of any such grant; although all the other grants made in the same year and month, and on the same day, are carefully recorded and registered, and the expedientes found on file.

These facts might well justify the government officers in questioning the authenticity of this grant, whatever the character and standing of the parties might be, who pretend to establish it by their testimony.

The claimants, in order to establish their title, examined Jose M. Covarrubias, who was secretary to the governor, Pio Pico, at the time the grant purports to have been signed. He testifies that "it is in his handwriting, and the attestation is his signature; that he does not remember to have seen Pio Pico sign it; but that his signature appears to be genuine, and he believes he signed it."

We shall have occasion to notice the testimony of this witness more particularly hereafter. At present we only say, that there is no reason to doubt the truth of his statement, so far as he attests his own acts; but that he wrote and signed it on the day it bears date, needs confirmation; for, if it was so written and signed by him on that day, he should be able to give some reason why it does not appear on the register with the other grants made on the same day. It is true, he attempts to do this by alleging that he registered it in some other book not found in the archives, but he cannot give a reason why all other grants were on the book found, and this one alone in some unknown register. If it was so written and signed by him on the 4th of December, 1845, it is incumbent on the claimants to give some account of it—to show why it was kept secret till 1853. If in possession of the grantee, why it was not produced and laid before the commissioners; why the petition and marginal order forming part of the expediente, if [* 535] *there was one, is found in the possession of the grantee; and where and when the certificate of approval was found and kept.

These and many other questions, which demand a solution, the claimants have not endeavored to answer. But they endeavor to prove—1st, that this grant was seen about the time it bears date; and 2d, that Rosa had a ranch on this tract of land, with a stock of

cattle and horses, and resided on it, for a time at least, with his wife and family, up to 1849, claiming it as his own.

The chief witnesses to establish these facts, besides numerous others, called to prove the possession, are Jose de la Rosa, Mariano G. Vallejo, and his brother, Salvador Vallejo. More than twenty witnesses have been called to prove that the character for veracity of these persons is so bad that they should not be believed on their oaths. As many testify to their good character, and especially to that of Mariano G. Vallejo.

There is proof also of declarations of Rosa that Vallejo was indebted to him or his false swearing for the property he possesses: "That the only right way of swearing was by the priest, with the Catholic cross," and that "he was not afraid of the laws from the way the Americans swore witnesses."

Such testimony of admissions is of very little value, and is generally not worthy of regard; and the testimony as to character is so equally balanced, that we do not feel at liberty to reject any portion of it for that reason. There are many more satisfactory tests of the truth of parol testimony than that of character of the witnesses. Where the facts sworn to are capable of contradiction, they may be proved by others not to be true; and when they are not, the internal evidence is often more convincing than any other. A shrewd witness, who is swearing falsely to something which cannot be disproved by direct testimony, will confine his recollection wholly to that single fact, professing a want of recollection of all the facts and circumstances attending it. An inexperienced witness, whose willingness to oblige his friend exceeds his judgment, will endeavor to give verisimilitude to his tale by a recital of imaginary circumstances. A stringent* cross-examination will gen- [* 536] erally involve the latter in a web of contradictions, which will be in a measure evaded by the other, with the answer that he "*does not recollect.*" Where many witnesses are produced to the same facts, and they contradict one another in material circumstances, they prove themselves unworthy of credit.

It would be a tedious, and we believe an unnecessary task, to examine severally the testimony of the 120 witnesses examined in this case, and test their respective credibility on the principles we have stated. With the exception of a few remarks on the testimony of the witness already alluded to, we shall therefore content ourselves with stating the result of our examination, without an attempt to vindicate its correctness by exhibiting the process by which it has been attained.

Jose de la Rosa was called by the claimants, and examined.

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Having sold to the claimants without general warranty, he was a competent witness. He was the person who might elucidate and explain the many difficulties and suspicious circumstances connected with this transaction, if they were capable of explanation. But, instead of it, we find his examination in chief exceedingly brief. He is asked to prove the signatures of Pico and Covarrubias from his knowledge of their signatures. He is then asked if he ever had in his possession this grant, and when and where he received it. To which he answers, that "he received it from Don Mariano G. Vallejo, in Sonoma, in the latter part of December, 1845."

He is then asked if he ever had in his possession the certificate of approval, and when and where he received it. To which he answers, that it was delivered to him by Vallejo in the beginning of the year 1846.

With this meagre statement of matters, impossible to be contradicted except by Vallejo himself, the claimants conclude their examination in chief. The cross-examination fully confirms the wise caution of the claimant's counsel in not troubling the witness with too many questions.

When asked to explain his circumstances since 1846, he answers, that "he is rich; that his wealth consists in money at present; [* 537] formerly in horses, cows, oxen, houses, and land, and a house in Sonoma. Of mares and horses (he says) I have probably had five hundred, but not all at one time. From 1846 to 1847, I had 500 head of cattle; that in 1846 he had four hundred upon the rancho of Julpines." Now, all this has been proved by numerous witnesses to be utterly false. It would be tedious to notice all the absurdities and contradictions of himself, to be found in this cross-examination, as to the mode in which he has disposed of his wealth.

With regard to the existence of this grant, Mariano G. Vallejo testifies that he received it by a courier from the governor, in December, 1845; that he handed it to Rosa, "*and he was much pleased.*" That this was the only paper received by him, *and that is all.* On cross-examination, he said he had seen the petition before he saw it on the files of the land office, but not the approval.

Again, in answer to another question, he denies ever having seen any paper but the grant at the time he received it, or afterwards, till he found the three papers connected together in the land office. In this he contradicts not only himself, but Rosa, who says he received the certificate of approval from him.

This testimony, instead of solving the difficulty as to the origin and history of this grant, leaves it in greater obscurity than it was before.

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The testimony offered to prove the possession and improvements is so contradictory as to furnish material evidence of its untruth. One witness describes the house built by Rosa as made of poles; another declares that it was an abode house, and that Rosa resided in it with his family; and as the house was near the Sacramento road, he had frequently seen them in it, and their cattle, horses, &c., on the land, up to the year 1849; another, that the house was more than eight leagues from the road. One says that he lent Rosa horses to convey his family to the rancho; another, that he took them in a boat; while Rosa himself ignores the boat, and swears he had horses of his own, and had no need to borrow, and that his family or himself had never resided anywhere but in the town of Sonoma, forty miles distant from the land—sometimes visiting his *rancho for two or three days. [* 538] Another, after swearing to the fact of residence by Rosa and family on the land, admits, on cross-examination, that he never saw the land.

The testimony for the United States establishes beyond a doubt that the whole of this testimony is a mere fabrication; that Rosa never resided on the land; that he had no cattle or horses, but lived in the town of Sonoma, a dependent of General Vallejo; with difficulty gaining a precarious support from his numerous avocations; always declaring to the tax assessors that he had no real property, except a small lot in Sonoma, and no personalty beyond a cow and a horse.

Thus far the testimony produced by the claimants, instead of dispelling the suspicions attached to this grant, has only increased them—forcing on our minds the conviction that a grant attempted to be supported by perjury must necessarily itself be false.

The first public appearance of this claim, therefore, cannot be dated earlier than the 18th of March, 1853, when Jose de la Rosa makes his conveyance to the claimants, reciting this paper of the 4th of December, 1845, for the alleged consideration of \$15,000. This deed describes the land by boundaries, and is entirely silent as to quantity.

Now, we need not have recourse to the testimony of Rafael Guirado of the conversation overheard in the house of Vallejo between him and the claimants, and the alleged confessions of Vallejo with regard to this grant. Some doubts have been cast upon the character of this witness for veracity, and the testimony of such declarations and admissions is generally worthy of little reliance. Nevertheless, his story has an air of probability when connected

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with other evidence in the case, that forbids the conclusion that so great a simpleton as Guirado could ever have invented it.

The United States, in order to support this issue, are not bound to show by whom a scheme of fraud has been concocted, or how, when, and where it was executed. It will be sufficient if they can show facts inconsistent with the allegation that the deed in contest existed on the day or year of its date. It is possible that [* 539] the officers of the late government *may execute grants since their power has ceased; and when called to prove their authenticity, may forget to mention the fact that their deeds are antedated. We regret to say that the testimony in this case justifies and demands this assertion.

Three facts tending to prove the authenticity of this grant are proved by claimants: 1st, that the petition *now* produced in connection with the grant was signed by Jose de la Rosa; 2d, that the marginal order on the same is in the handwriting of Covarrubias, the secretary, being the only instance in which he has been known to have acted as clerk to make such entry; 3d, the titulo and certificate of approval are in his handwriting, and signed by him.

Admitting these facts to be proved, we must inquire whether there is sufficient evidence to convince us that these documents were not executed at the time of their date, but some seven years thereafter.

I. We have already shown that this grant made its *first* public appearance in 1853, when it suddenly came forth, *as is alleged*, from the chest or pocket of Jose de la Rosa, and was immediately transferred to the claimants.

II. That the grantee himself, examined as a witness, can give no consistent or probable history of its origin, or why he had always lived in ignorance of it; or if its existence was known to him, why he kept it a secret, or why a poor and garrulous old man should never mention it to friend or neighbor till about the date of its public appearance; or what possible motive could be found for a millionaire living as a pauper for so many years, and then disposing of his immense estate for a trifle.

III. We have shown also that the testimony of the witnesses called to prove a long possession and claim under this title is a tissue of falsehoods.

These facts alone would be sufficient to condemn this grant, and show that it had no existence before 1852; but if any doubts should still exist, that which remains to be stated will certainly dispel them.

IV. It is proved that the counsel to whom the claimants first

made application for his services to obtain a confirmation * of this grant, on examination of the document presented [* 540] to him as evidence of title, refused to be so employed, because the deed produced was a palpable forgery ; that it was *not* the instrument *now* produced ; that it had the signature of the secretary, Covarrubias, forged so badly that his name was twice misspelt in different ways, while the present is written by Covarrubias himself, and is consequently free from such blunders.

It has been argued that this testimony should be rejected as incompetent, because counsel has revealed the secrets of his client. To this it is answered, that the relation never existed, the counsel having refused to stand in that relation to the claimants. The right of privilege from examination was neither claimed by the counsel nor by the claimant, and the witness being examined without objection, we are not required to decide how far a counselor who has been requested and refused to be a partaker with persons attempting to defraud the government may plead his privilege, and refuse to answer. Having answered without objection, it cannot affect his credibility that he is willing to expose a fraud under these circumstances. As a witness, his testimony is unimpeached and uncontradicted, and unwillingly confirmed by Covarrubias.

V. When the application was made to Congress, the petition and certificate of approval do not *appear to have been found*, and were not annexed to the grant till it appeared on file in the land office.

VI. There is no attempt to account for the fact that the petition, instead of being annexed to the expediente, is found in the hands of claimants, and not among the archives, where the expedientes of all the authentic grants made in that year are found. To account for this fact, Covarrubias, in his first affidavit, testified "that it was the practice of the office to return the petition with the grant." But when his deposition was taken, with cross-examination, he is forced to confess the untruth of the first statement, and admits, what is a well-known fact, that the petition formed part of the expediente always preserved on file among the archives.

VII. No trace of this grant is to be found among the archives of the government ; it is not found on the registry of * grants for that year, while authentic grants made in that [* 541] year and month, and day of the month, are found on the files and registry.

VIII. The seal on this paper differs from that found on authentic grants of the same date, and Covarrubias himself admits that there was but one seal used in the office while he was secretary. This

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seal, on careful examination by persons qualified to judge, is proved to be a forgery.

IX. The signature of Pio Pico and his rubric, when compared with a large number of his authentic signatures found in the archives, and those made on the same day in which the grant in question is dated, is found to differ in many particulars from that found on this paper. His official signatures are remarkable for their uniformity. Many excellent judges have carefully scrutinized and compared these signatures, and declare the signatures in question are forgeries. Two of them express the opinion that the person who wrote the body of the instruments made the signatures also.

We have ourselves been able to compare these signatures by means of photographic copies, and fully concur (from evidence "*oculis subjecta fidelibus*") that the seal and the signature of Pico on this instrument are forgeries; and we are the more confirmed in this opinion by the testimony of Pico himself, found on the record. In a brief affidavit made on the 9th of June, 1853, he swears, without hesitation, that "the document bearing date December 4, 1845, was signed by him." But in his deposition taken in this cause on 27th of February, 1857, while this issue was pending, he appears to testify with very great caution. He seems to have drawn out a certain formula of words, on which it is clear that a conviction of perjury could never be sustained, whether his testimony was true or false. The answer is in these words, and three times repeated in the very same words:

"*I cannot now remember* in regard to the original document mentioned in said interrogatory, but the signature, as appears in the traced copy, *appears to be my signature*, and *I believe* it was placed there by me at the time the document bears date." His memory appears to be much weaker than his faith, as it [* 542] * might have been supposed that such a sale of territory would have attracted his attention sufficiently to be remembered forever after.

X. This certificate of approval by the departmental assembly bears date at a time when the public records and minutes of that body show that it was not in session. It is dated on the 18th of December, 1845, and the resolution of approval appears to have passed on the 11th of the same month.

The records of the proceedings of the assembly at the close of 1845, and the beginning of 1846, are preserved. They show that on the 8th October, 1845—

"The *sessions* of the assembly were suspended for the *rest of the*

year, in consequence of permission having been granted to the senores deputies, who reside out of this capital, to retire to the places of their residence, in view of the injuries they must suffer in consequence of their salaries, due them respectively, as functionaries, not being paid."

A publication of the foregoing in all the pueblos of the department was ordered to be made, October 11th, 1845.

The next session of the assembly, as shown by its journals, was on the 2d March, 1846. The journals state that the governor and certain deputies, who are named, had "assembled for the purpose of reopening the ordinary sessions, which, by a resolution of the body, had been suspended for the balance of last year. Whereupon the proceedings of the 8th day of October of the last year were read and approved," &c.

It is evident that no ordinary session of the assembly was held on the 11th December, the day on which this grant is certified to have been approved.

It is contended, however, that extraordinary sessions were held, of which no record was kept, and the testimony of several witnesses has been taken to establish the fact.

But this attempt to supplement or falsify these records has wholly failed, and more especially as it appears that all the other grants admitted to be genuine, and which are of a date later than the adjournment, were presented and approved after the assembly reassembled, on the 2d of March, 1846; and the form of words used in the certificate of approval of this one *dif- [* 543] fers from the eleven others, dated between November 22d, 1845, and December 19th, 1845.

In conclusion, we must say, that, after a careful examination of the testimony, we entertain no doubt that the title produced by the claimants is false and forged; and that, as an inference or corollary from the facts now brought to our notice, it may be received as a general rule of decision, that no grant of land purporting to have been issued from the late government of California should be received as genuine by the courts of the United States, unless it be found noted in the registers, or the expediente, or some part of it be found on file among the archives, where other and genuine grants of the same year are found; and that owing to the weakness of memory with regard to the dates of grants signed by them, the testimony of the late officers of that government cannot be received to supply or contradict the public records, or establish a title of which there is no trace to be found in the public archives.

Let the judgment of the district court be affirmed.

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ABATEMENT.

The pendency of proceedings in the probate court of a State cannot be pleaded in abatement of a suit in the federal court. *Green's Administratrix v. Creighton*, 464.....23 H. 90.

ADMIRALTY.

— COLLISION.

1. When a sail vessel and a steamer are approaching each other, it is the duty of the former to hold on her course and of the latter to keep out of her way. *The Steamship Pacific*, (*New York and Liverpool Mail Steamship Company v. Rumball*), 37.....21 H. 372.
2. These rules are binding on both vessels, from the time of possible collision until such possibility is passed, or until there is no chance of avoiding danger by that course. *Ib.*
3. As the steamer is bound to keep out of the way, and it devolves upon her to shape her course and adopt other means for the security of both vessels, it is necessary, to enable her to do this, that the sail vessel should steadily hold on her course. *Ib.*
4. The controversy in this case is on the question whether the sail vessel did not depart from this rule, improperly changing her course; and the court finds from the evidence that she did not, and that the steamer is responsible for the collision. *Ib.*
5. It is the established rule for tugs in the harbor of New York to offer their services by approaching in the wake of the vessel, and to come up on the starboard quarter and slack the engine, so as not to pass her. Tugs approaching in any other direction must round to, so as to head the same way as the vessel. *The R. L. Mabey*, (*Sturgis v. Clough et al.*), 8821 H. 451.
6. The Mabey, in this case, meeting the brig at an acute angle, run into the other tug, the Hector, which was approaching from the rear, according to the rule. As the collision was due to the violation by the Mabey of the rule which required her to round to and approach with her head in the same direction as the vessel, she must be held to pay the damages of the collision. *Ib.*
- In a collision between a steamer and a propeller on Lake Erie, the vessels approaching each other from opposite directions, or nearly so, in the night, with fair starlight, it was held—
7. That the propeller was in fault for the want of knowledge and skill of the mate in charge of her. *Chamberlain v. Ward and Ward v. Chamberlain*, 162.....21 H. 548-572.
8. For his persistence in pursuing his course, when he had ample time to avoid the danger by changing. *Ib.*
9. Because the signal light, though sufficient when put up, had been permitted to become dim for want of trimming and other attention. *Ib.*
10. The steamer was also chargeable with fault for want of a look-out or watch. The mate who has other duties, and attends to them, is not such sufficient look-out. The look out should give his exclusive attention to that business, and should be stationed where he could best see without obstruction by rigging, and without being too much elevated above the water. *Ib.*

11. Also because the mate in charge of the vessel, who discovered the lights of the propeller a mile away, though doubting what it was, did not take suitable steps to avoid a collision, while running at the rate of sixteen miles an hour. *Ib.*
12. The true construction of the act of March 3, 1859, which makes a vessel liable for all the damages arising from want of proper signal lights, does not impair the admiralty rule that where, in case of collision, the other vessel is also in fault, the damages should be divided. The other vessel in such case is not relieved from the consequences of her own wrong by this provision. *Ib.*
13. The result in this case is, that their damages must be equally divided between the owners of the two vessels, as it is a suit in *personam*. *Ib.*
14. In a narrow stream, at a time when steamboats are using it, a flat-boat should have lights on each end in the night, oars at each end also, and should descend the stream with its length parallel to the current, and not diagonally across it; and for failing to observe these matters, the boat was in fault. *The Brigadier General Stokes*, (*Nelson v. Leland*,) 228.....22 H. 48.
15. The steamer was also in fault, because the pilot, mistaking the light which he saw on the boat for a landing place, did not stop his vessel until he could be assured he was right. The boat is responsible for such mistakes, when they might be avoided by due care. *Ib.*
16. In a case of collision between a steamship and a propeller, with a barge in tow, the latter is not to be treated or to govern herself as a sailing vessel under similar circumstances. *The Keystone State*, (*New York and Baltimore Transportation Company v. Philadelphia and Savannah Steam Navigation Company*,) 41022 H. 461.
17. She is bound by the rule that two steam vessels approaching each other in opposite directions must each port helm and go to the right. *Ib.*
18. A look-out, standing behind the wheel-house, so that it obstructs his view forward, is not in his proper place. The owner of the barge sunk by the collision cannot recover on account of a violation of these rules by the propeller. *Ib.*
19. It is the duty of a sailing vessel to keep her course and a steamer to keep out of the way when approaching each other. *The Louisiana*, (*Haney et al. v. Baltimore Steam Packet Company*,) 54323 H. 287.
20. It is the duty of a steamer to have a look-out, who shall be assigned to that duty alone. *Ib.*
21. It is the duty of the officer whose watch it is, to be on deck, especially if he knows another vessel is approaching. *Ib.*
22. A violation of any of these rules renders the vessel liable for the consequences. *Ib.*
23. Where two sailing vessels are approaching each other in converging lines, and the one in the rear is the heaviest and the fastest sailer, it is her special duty to give way if there is danger of collision as they approach. *The Fannie Crocker*, (*Whitridge et al. v. Dill et al.*,) 647.23 H. 448.
24. A vessel is in fault for want of a sufficient look-out, when the only look-out is so engaged in working the sails that he does not discover a vessel ahead of or parallel with his until too late to avoid a collision. *Ib.*

— DELIVERY OF CARGO.

1. The general rule is that delivery of goods at the place of destination, or readiness to deliver, is a precedent condition to the right to demand payment of freight. *The Ship Alboni*, (*Brittan v. Burnaby*,) 14821 H. 527.
2. If the shipment is large, so that it cannot be landed in one day, the master may require a *pro rata* payment, as regards value, before the parcels first landed can be taken away; but he cannot demand payment for all on delivery of a part. *Ib.*
3. Words stamped on the back of the bill of lading by the master, without evidence of the assent of the consignee or shipper of the goods, cannot vary this rule so as to authorize a demand of payment for all before any of the goods are ready for delivery. *Ib.*

4. By the laws of Brazil, goods not found on the manifest of a vessel, nor added to it before delivery, are liable to seizure and confiscation. The owner of a vessel who contracted to deliver goods to consignee in Rio de Janeiro, is responsible for the failure of the master to observe this law, if the goods are thereby lost to the consignee. *The Bark Griffin*, (*Howland v. Greenway*), 424.....22 H. 491.
5. It is no defense, under such circumstances, that the goods were actually landed and received in the custom house and the duties paid by consignees. The delivery contracted for by the master is a delivery free from prior liability to confiscation for his acts in violating the local revenue law. *Ib.*
6. What constitutes a delivery to a consignee in an ordinary contract of affreightment will depend largely on the established usages of the particular trade, and of the port in which the delivery is made. *The Bark Tungier*, (*Richardson v. Goddard*), 442.....23 H. 28.
7. By the commercial and maritime law it is the settled rule that the carrier by water shall carry from port to port and from wharf to wharf, and is not bound to deliver at the warehouse or business place of the consignee. *Ib.*
8. Goods delivered at the proper wharf at a proper time, with notice to consignee, is a good delivery, though, if consignee refuse to receive them, it is the duty of the carrier to put them in a place of safety. *Ib.*
9. The day of fasting and prayer fixed by proclamation of the governor of Massachusetts is not, by law or by any general usage or custom of the city of Boston, a day on which labor or business is forbidden, and a delivery on that day on the wharf was a valid delivery; and a loss by fire consequent on the failure of the consignees to remove the goods from the wharf on that day is not chargeable to the vessel or her owners. *Ib.*

—— JURISDICTION.

1. The admiralty jurisdiction extends to the Yazoo river, although it is wholly within the State of Mississippi, and the stage of the water is sometimes too low for practicable navigation. *The Brigadier General Stokes*, (*Nelson et al. v. Leland et al.*), 228.....22 H. 48.
2. The district court of the United States sitting in admiralty has no jurisdiction of a contract of partnership for the use of a vessel put into a line for carrying passengers and freight. The contract arranged the contributions which each party was to make, and the share of profits to be received; and though one of the parties furnished the vessel, the contract was not a charter party. *Ward v. Thompson*, 361.....22 H. 330.
3. While the jurisdiction of the admiralty court in cases of contract depends on the nature of the contract, in torts it depends solely on the locality. Hence, leaving piles concealed in the navigable waters of a river, by which a vessel is injured, is a marine tort. *Philadelphia, Wilmington, and Baltimore Railroad Company v. The Philadelphia and Havre de Grace Steam Towboat Company*, 507.....23 H. 209.
4. This court reasserts the decision of the *New Jersey Steamboat Company v. The Merchants' Bank*, 6 Howard, 334, that the district courts sitting in admiralty have jurisdiction of contracts of charter-party and affreightment, which are maritime contracts. *Morewood v. Enequist*, 677.....23 H. 491.
5. Also, that where the district and circuit courts have made the same finding of facts on conflicting testimony, this court will not reverse on a doubt raised by such testimony. *Ib.*

—— MARITIME LIEN.

1. Building a ship, supplying engines or furnishing timber for her, is not a maritime contract. *People's Ferry Co. v. Beers*, 20 H. 400, (2 Miller, 489,) reaffirmed. *Steamer Capitol*, (*Roach et al. v. Chapman et al.*), 260.....22 H. 129.
2. The district courts of the United States, therefore, have no jurisdiction of such a

contract; nor can a State statute giving a lien on the vessel in such case give jurisdiction in the federal court. *Ib.*

— PLEADING AND PRACTICE.

1. Where, both in the libel and answer, the issue made is upon the improper stowage of the cargo, and carelessness in landing, reloading, and re-stowing under a deck which was leaky, the court cannot inquire into the seaworthiness of the vessel, or any other cause of injury than the one put in issue. *The Ship Pons Aëlii, (McKinlay v. Morris,)* 18.....21 H. 343.
2. The court finds in this case, from an examination of the testimony, that the injury did not accrue from either of the causes charged in the libel. *Ib.*
3. The injury to the goods (soap) was the result of a sweating process, caused by the agitation of the vessel and the high temperature, for which the vessel is not liable. *Ib.*
4. Whatever may be the rule of courts of common law, as to the circumstances under which a consignee may sue for an injury to the cargo, there is no difficulty in the way of such suit in a court of admiralty. *Ib.*

JURISDICTION OF CIRCUIT COURT, 1, 2, 3, 4; SALVAGE, 2.

— SALVAGE.

1. Where parties made a contract for raising a vessel within a certain time and for a definite compensation, they cannot repudiate the contract and libel the vessel for salvage. *Steamboat Kate, (Bondies v. Sherwood,)* 298.....22 H. 214.
2. Whether an admiralty suit *in rem* and *in personam* in the same libel can be sustained, and whether admiralty has jurisdiction of a salvage case occurring on a river wholly within a State, are open questions in this court not necessary to the decision of this case. *Ib.*

AGENCY.

1. Where the agreement shows that the contract with the agent was for his principal, whose name and residence is disclosed in the writing, the right of the principal to sue on it cannot be denied on the ground that he resided in another State, and the defendants looked to the agent alone in the matter. *Oelricks et al. v. Ford,* 451 23 H. 49.
2. A railroad company having contracted for the driving of these piles, as part of their bridge across the Susquehanna, and their engineer having superintended the work, and the company having abandoned their bridge before built and discharged the contractor, is responsible for the dangerous condition in which the piles were left. *Philadelphia, Baltimore, and Wilmington Railroad Company v. The Philadelphia and Havre de Grace Steam Tugboat Company,* 507.....23 H. 209.

BANKS AND BANKING; CONTRACTS, CONSTRUCTION OF, 6; EVIDENCE, 2, 3.

BANKS AND BANKING.

The cashier of a bank wrote to the secretary of the treasury, authorizing one of the directors, as agent of the bank, to contract for the transfer of money from New York to New Orleans. Held, that such an authority was not within the ordinary power of the cashier alone, and that as no act of the board of directors nor any rule of the bank had given such authority, the contract was not binding on the bank. The special circumstances under which the letter was written fully considered. *United States v. The City Bank of Columbus,* 28.....21 H. 356.

APPEALS AND WRITS OF ERROR.

JURISDICTION OF SUPREME COURT; PRACTICE IN SUPREME COURT.

BOUNDARY OF GEORGIA AND ALABAMA.

The point in dispute is, whether the boundary is the *western bank* of the Chattahoochee river or the low-water mark of the west side of that river. This depends on the construction of the line described in the treaty of cession by Georgia to the United States, to wit: "west of a line beginning on the western bank of the Chattahoochee river, where the same crosses the boundary between the United States and Spain, running up said river and along the western bank thereof." Held, that the western bank is the boundary line, that the jurisdiction of the bed of the river is in Georgia, and includes all that part of the soil which is alternately covered and left bare, and which is adequate to contain it at its average and mean stage during the entire year. *The State of Alabama v. The State of Georgia*, 687.....23 H. 505.

CALIFORNIA LAND GRANTS.

1. Micheltorena's general power to Sutter to grant or confirm titles within his jurisdiction of New Helvetia and Sacramento was abrogated by the unsuccessful issue and overthrow of the former in the contest in which he was then engaged. *United States v. Nye*, 62.....21 H. 408.
2. In the present case the power conferred was exercised more than a year after Micheltorena's abdication, and the claim founded on it is void, and the claimant's petition must be dismissed. *Ib.*
3. Under the act of March 3, 1851, concerning private land claims in California, an appeal may be had to this court from the decree of the district court confirming or rejecting the claim, and another appeal from a subsequent decree rendered after it is remanded from this court ascertaining the boundaries. *United States v. Fossett*, 83.....21 H. 445.
4. But this last decree must be conclusive as to the boundaries, which is not the case when only three sides of the grant are given, and the survey has not been made or completed. *Ib.*
5. The district court has power to compel the completion of a survey according to its decree; and until this is done there is no final decree on the question of boundary, in case where a survey is necessary, from which an appeal lies. *Ib.*
6. The decree of the district court confirming this claim is reversed and remanded for a further hearing and additional testimony, for the following reasons: The title or concession was really made a few days before the possession of California by the Americans, and the date was altered to make it appear to have been February instead of June. There was no actual occupation, though claimant swears there was. The genuineness of the governor's signature seems to be very doubtful. *United States v. Galbraith*, 246.....22 H. 89.
7. Where the grant gives specific boundaries, and also states that the grant is one league in length and three quarters in breadth, a little more or less, also speaking of the surplus to be left to the nation, the concession is confirmed for the *quantity* mentioned inside the boundaries described. *Gonzales v. United States*, 273.....22 H. 161.
8. A grant with boundaries, but not well defined, the land being two square leagues, a little more or less, with *diseño* and other matters: Held, that claimant is entitled to *two leagues* square, or four square leagues, within the described boundaries. *United States v. Pacheco*, 306.....22 H. 225.
9. Claimant shows an order of 1844 from Micheltorena, governor of California, authorizing him to search for and settle upon land, with a view to a future grant, a petition for the land to Governor Pico in 1846, and a reference to the alcalde for information, and the report of this officer that the land was not private property. This, with proof of possession under the first order, was all claimant's evidence: Held, that it showed no grant or other vested rights, and the claim must be rejected. *United States v. Garcia*, 330.....22 H. 274.
10. The laws of Mexico concerning grants of land permitted one league of irrigable land,

- four leagues of farming land, not irrigable, and six for pasturage or stock raising, and no more, to one person. *United States v. Hartnell's Executors*, 335.....22 H. 286.
11. The departmental assembly, for this reason, reduced the present grant to eleven leagues, and this was properly done. *Ib.*
 12. The action of the departmental assembly is conclusive, because, by the laws of Mexico it had the right to confirm, reject, or modify the concessions of the governor. *Ib.*
 13. The 12th section of the act of 1852, concerning appeals from the board of commissioners, enacts that the appeal from the decree of the board shall be considered as dismissed, unless notice of the appeal be given within six months after the transcript is filed with the court: Held, that this provision is mandatory, and neither sickness of counsel nor other hardship can enable the district court to hear the appeal where the notice is not given within the time required by the statute. *Yurbité's Executors v. United States*, 337.....22 H. 290.
 14. Where there is an apparent alteration in the date of a grant, but which is to the prejudice of the claimant, he will not be held responsible for it when the true date has been established. *United States v. De Haro's Heirs*, 339.....22 H. 293.
 15. Sixteen years' possession and occupation of the lot, with a house on it, under a grant from Alvarado, to which the only objection against the claimant is the alteration of date should remove the difficulty, and the claim is confirmed. *Ib.*
 16. When Jimeno's Index and other archives of the Mexican government show a grant, and the extent of it, subsequent alterations in the original papers, with intent to enlarge the quantity, will not necessarily defeat the grant for the quantity actually conceded. *United States v. West's Heirs*, 354..... 22 H. 315.
 17. Though Jimeno's Index is not authoritative evidence of grants included in it, nor against those not found there, it is evidence, in this instance, of his own action, as he was governor *ad interim* when West's concession was made. *Ib.*
 18. The paper or document of concession by the governor, if genuine, of which there is doubt, stands alone. None of the preliminary steps required by the regulations of 1828, such as petition, reference for report, or report of the proper officer, a delivery of possession, or approval of the departmental assembly, is found. Evidence of actual possession is unsatisfactory, and the endorsement on the concession that it is recorded in the proper book is shown to be false. For these reasons the judgment of the district court confirming the claim is reversed, with leave to produce further evidence. *United States v. Teschmaker et al.*, 387.....22 H. 392.
 19. In the absence of any record evidence of the title, and of the usual preliminary petition, reference, and *informe*, the grant and all the other papers arising from the private possession of the claimant, held insufficient to establish the claim. The doctrine of the previous case applied to this. *United States v. Pico*, 391..... 22 H. 406. *United States v. Vallejo*, 392.....22 H. 416.
 20. Where the petition, the *informe*, the grant of the governor, and approval of the departmental assembly are all regular, and accompanied by ten years' possession, these will be held, on the question whether the grantee was a foreigner, to outweigh a few loose expressions of the grantee in private conversation which look the other way. This court does not now decide whether the fact that the grantee was a foreigner would defeat the claim. *Dalton v. United States*, 397. .22 H. 434.
 21. Where the case stands exclusively upon the paper in possession of claimant purporting to be a grant, with no petition, no *informe*, no reference for such, no order of survey or possession, no approval of the departmental assembly, and doubtful evidence of the genuineness of the governor's signature, the claim will be rejected. *Fuentes v. United States*, 401.....22 H. 443.
 22. The case is fatally defective, even if the signature be genuine, for want of performance of the conditions of the grant, as it amounts, in this case, to evidence that the claim had been abandoned before the title passed to the United States. *Ib.*
 23. Where it appears that a valid grant has been made by the Mexican government the courts will not permit the authority of the federal government to be interposed

- against a claimant on the ground that another claimant has a better right. In such case the United States has no interest. *United States v. White's Administratrix*, 52223 H. 249.
24. But where the court below has permitted the United States to set up the rights of a third party against claimant, this court will reverse and remand the cause, that the conflicting rights of the adverse claimant may be contested according to the provisions of section 13 of the act of March 3, 1851. *Ib.*
25. This court re-examines the question of the validity of the "general title of Sutter," and holds that it was the offspring of an improper agreement of Micheltorena to procure Sutter's assistance in his contest for power, in which he was overthrown, and this act of his was never recognized by the departmental assembly, with whom he was at war, nor by the Mexican government, who acquiesced in his overthrow. It is not, therefore, a claim sustained by the Mexican government or supported by its laws, and is not protected by the treaty of Guadalupe Hidalgo. *United States v. Rose et al.*, 52623 H. 262. *Same v. Bennitz*, 525.....23 H. 255. *Same v. Pratt. Same v. Murphy*, 667.....23 H. 476.
26. The claim in this case is founded on a grant by Governor Alvarado, which purports to have been authorized by a special order or decree of the president of Mexico, and not under the colonization laws of Mexico. The authority thus delegated must be strictly pursued. *United States v. Osio*, 532.....23 H. 273.
27. The power conferred was a joint power in the governor and departmental assembly; and as the latter never took any part in making the grant or in conferring it, it is void. *Ib.*
28. Where, in 1841, the governor made a grant, subject to an inquiry as to whether it was vacant, with a condition to furnish a disefio, and to inhabit and cultivate the land, and nothing is done under the grant until 1852—no expediente found in the archives; no possession; no approval of the departmental assembly—and the grantee sells his claim two days before his assignee files the claim with the commissioners, it must be rejected. *United States v. Noe*, 561.....23 H. 312.
29. Where claimant showed a petition for the land, an order of the governor permitting him to occupy it while proceedings were in progress to perfect his title, a report that the land was subject to grant, and continued occupation for fourteen years, with cultivation and improvement, this court will not reverse the decrees of the commissioner and of the district court in his favor. *United States v. Alviso*, 564.....23 H. 318.
30. A titulo produced from the private custody of claimant, dated July 20, 1846, thirteen days after the occupation of Monterey by the American forces, unaccompanied by satisfactory evidence of occupation, or assertion of claim prior to 1853, will not support the claim, and the decree of the district court in his favor is reversed. *United States v. Pico*, 566.....23 H. 321.
31. The claimant shows no archive evidence of his grant, and does not show that any ever existed. The Mexican government relied on its records, and not on the paper given to a claimant, as the evidence of its acts, and so does this court. *United States v. Bolton*, 578.....23 H. 341.
32. All the circumstances, the evidence being thoroughly examined in the opinion, go to prove that the claim is a fraud; and the decree establishing it is reversed. *Ib.*
33. In locating by surveys the grants confirmed under the act of 1851, the surveyor is to be bound by the decree of confirmation, so far as it fixes locations, boundaries, or quantity. *Castro v. Hendricks*, 640 23 H. 438.
34. In making this survey his acts are under the control and supervision of the commissioner of the general land office, who cannot be compelled to affirm a survey and issue a patent, by a writ of *mandamus*, when such survey is manifestly wrong. *Ib.*
35. An order of the central Mexican government to the governor of California authorized him to grant the lands of the islands adjacent to the department in conjunction with the assembly. A dispatch of the same date required him to reserve such islands as Castillero might select, and grant the same to him. Held, that a grant of the island

of Santa Cruz under this order to Castillero did not require the confirmation of the assembly, and, being regular in all other respects, must be confirmed. *United States v. Castillero*, 657..... 23 H. 464.

36. The petition on which the land was granted was for two leagues, according to a plan or diseño furnished. The grant was for land of the extent mentioned in the plan, the surplus to remain for the use of the nation. Held, that the claim could not be confirmed for more than the two leagues, though the plan included a much larger quantity. *Yontz v. United States*, 680.....23 H. 495.
37. In this case the claim was rejected by the board of commissioners and by the district court, and, on appeal, this court, on a thorough examination of the claim, rejects the pretended grant as founded solely on fraud and forgery. *Luco v. United States*, 692.....23 H. 515.

COMPENSATION OF COLLECTORS OF THE CUSTOMS.

On examination of all the statutes concerning compensation for extra services from the act of May 7, 1822, to those of 1851, 1852, and 1853, in the appropriation bills of those years, the court comes to the following conclusions:

1. No allowance can be made by a head of a department to any officer beyond his fixed compensation, except for duties required to be performed by law, and for which the law has fixed a certain compensation. *Converse v. The United States*, 96..... 21 H. 463.
2. That the services for which this compensation is allowed must be such as have no connection with the duties of the office he holds. *Ib.*
3. The law authorized the secretary of the treasury to employ an agent to make contracts, purchase supplies, and disburse the money to be used on the light-house service, and it fixed the compensation at two and a half per cent. upon the amount of the disbursements. *Ib.*
4. Though the secretary might have imposed upon the collector of the port of Boston these duties, so far as they related to the light-houses within his district, without extra compensation, he had no right to do so as regards all the light houses in the United States. This duty was not one connected with or growing out of his office of collector of the port of Boston. *Ib.*
5. Hence, for such a service the collector is entitled, as any other agent would be, to the commission which the law allows for it; and the acts aforesaid, rightly construed, do not forbid it. *Ib.*
6. The limitation of the salary of collectors of the non-enumerated ports, under the act of May 7, 1822, to \$3,000, is not repealed by any subsequent act of congress. *United States v. Walker*, 344.....22 H. 299.
7. But, by the act of March 3, 1841, they are entitled to receive whatever profits are made from rent and storage, beyond the rent paid out, to the amount of \$2,000.
8. But any sum beyond the \$2,000 so received must be paid into the treasury of the United States. *Ib.*

CONSTITUTIONAL LAW.

1. The act of congress of September 18, 1850, usually called the fugitive slave law, is constitutional and valid. *Ableman v. Booth*, 130.....21 H. 506.
2. The exclusive jurisdiction for offenses against that law in the State of Wisconsin is vested in the district court of the United States for that district, and from its judgment no appeal or writ of error lies to any other court, State or federal. *Ib.*
3. The commissioner of the United States has authority to examine and commit, for the action of the district court and its grand jury, a prisoner charged with an offense against that act; and no State court has any jurisdiction or authority to release a prisoner so committed. *Ib.*
4. State courts have no power to review or reverse the judgment of the courts of the

- United States; and an attempt to do this, by virtue of a writ of *habeas corpus*, is without jurisdiction, and a violation of the law and constitution of the United States. *Ib.*
5. When a State court is informed that a person is unlawfully imprisoned, it is its duty, by reason of its general power to release persons so situated, to issue the writ; and when it is made known to the court that the person is held by virtue of an order of a court of the United States, the writ should be discharged. *Ib.*
 6. So, when the officer who holds the prisoner under such authority is served with the writ, he should make return of the cause of the commitment and his authority for holding him, but should not deliver the prisoner to the court or part with his custody. *Ib.*
 7. The act of congress of February 17, 1793, providing for the enrollment and license of vessels engaged in the coasting trade, is the supreme law of the land, and authorizes the vessels so licensed to engage in the coasting trade within the States. *Sinnot v. The Commissioners of Pilotage of Mobile*, 307.....22 H. 227.
 8. The statute of the State of Alabama of 1854, requiring all steamboats engaged in navigating the waters of that State, before they shall leave the port of Mobile, to file in the office of the probate judge of Mobile a written statement of the name of the vessel, also of the owners, their place of residence, and their relative interest in her, and imposing a fine for failing to do so, is in conflict with the act of congress, and therefore void. *Ib.*
 9. A steamboat licensed and enrolled under the act of 1793, engaged in towing and lightering between the lower bay of Mobile and the city, is engaged in the coasting trade; and the act of 1854 of the Alabama legislature is unconstitutional and void as applied to such a vessel. The doctrines of the preceding case govern this. *Foster v. The Commissioners of Pilotage of Mobile*, 313.....22 H. 244.

JURISDICTION OF SUPREME COURT, OVER STATE COURTS, 1.; MUNICIPAL BONDS, 1, 2;
STATE STATUTES, 1, 2.

CONTRACTS.

— CONSTRUCTION OF.

1. A contract for the use of Morse's patent for telegraphing over lines between certain points does not prevent other parties from conveying messages between the same points, if carried over other and more circuitous routes—the contract for the use of the patent containing nothing which forbid this to be done. *Western Telegraph Company v. Magnetic Telegraph Company*, 91.....21 How. 456.
2. The court adheres to its decision in this case, when here before, that the time of performance of the written contract was material; and no recovery could be had on that agreement unless strict performance was proved. 1 Miller, 653. *Emerson v. Slater*, 218.....22 H. 28.
3. But the undertaking of Slater, a stockholder in the railroad company, in that instrument, was an original undertaking on a sufficient consideration, and was not an agreement to answer for debt of another, within the meaning of the statute of frauds. *Ib.*
4. Therefore a subsequent parol agreement to enlarge the time for the performance, on good consideration, of the work by plaintiff, is admissible in evidence under the common counts. *Ib.*
5. Where a person employed a real estate broker to sell his property, and the broker made a sale on terms to which the vendor and purchaser agreed, the broker is entitled to the usual compensation, notwithstanding his principal afterwards refused to complete the sale by executing the necessary writings. *Kock v. Emmerling*, 236.....22 H. 69.
6. The following contract of guaranty was indorsed on the back of an agreement by Hopkins & Leach to build and put in operation a steam engine for running the machinery of a saw and grist mill: "For value received, I hereby guaranty the performance of the within contract on the part of Hopkins & Leach; and in case of

- non-performance thereof, to refund to Messrs. Hillard & Mordecai all sums of money they may pay or advance thereon, with interest from the time the same is paid." Held, that this is not an alternative contract, but is an obligation that the contractors shall perform the contract by building such machines as it calls for, and if there is a non-performance, whether excusable or not, to repay the money advanced by the other party. *Benjamin v. Hillard et al.*, 485.....23 H. 149.
7. The consent of plaintiffs to a prolongation of the time of performance did not relieve the guarantor from his liability for the character of the work. Nor did the receipt and payment of the full price by plaintiffs have that effect. *Ib.* Also, *Dermott v. Jones*, 512.....23 H. 220.
8. What is a full cargo for a vessel is matter to be determined by the evidence of experts; and as three competent witnesses testify that the vessel in this case was loaded as deep as prudence permitted, no damages can be recovered for refusal to take more. *Ogden v. Parsons*, 490.....23 H. 167.

— FOR BUILDING.

1. Where, by a special contract for building, the time is fixed within which it is to be completed, the builder is not relieved from his obligation as to time by a change in the work ordered by the owner, unless the builder procures the assent of the owner to an enlargement of the time when he consents to the change in the work. *Dermott v. Jones*, 512.....23 H. 220; *Benjamin v. Hillard*, 485.....23 H. 149.
2. Nor can he recover in such case on a count which sets out the contract specifically and avers performance of it. *Ib.*
3. Neither the extra work ordered, nor the sinking of the foundation, nor the acceptance by the plaintiff of the building afterwards, was any release of the defendant from his obligation to finish within the time limited by the contract. *Ib.*
4. But when that time had passed, and plaintiff, with the knowledge and consent of defendant, continued to do the work specified in the contract, and to do extra work, and when the work, however imperfectly done, was afterwards accepted by the defendant, the law implies that the work done and materials furnished must be paid for. *Ib.*
5. In such case the law implies a promise to pay such remuneration as the benefit conferred is worth, and this may be recovered in an action of *indebitatus assumpsit*. *Ib.*
6. But the defendant may, in such action, set off or recoup the damages sustained by her for the failure of the plaintiff to perform his special contract, and is not driven to an original action against the plaintiff on the contract. *Ib.*

AGENCY, 1, 2; EVIDENCE, USAGE, 1, 2, 3, 4; JURISDICTION CIRCUIT COURT, CITIZENSHIP, 1, 2, 3, 4; MUNICIPAL BONDS, 1, 2, 3.

CORPORATIONS.

1. A corporation may, without special authority, in the course of legitimate business, make a bond, note, draft, mortgage, or an assignment. *White Water Valley Company v. Vallette*, 66.....21 H. 414.
2. In the present case the charter of the appellant company gave such authority by its terms. *Ib.*
3. The two corporation defendants were incorporated to build two distinct lines of railroad into the city of Indianapolis. They had no right to consolidate into one company without legislative authority to do so. *Pearce et al. v. The Railroad Companies*, 80.....21 H. 441.
4. Nor can corporations organized to build railroads, buy steamboats to run in connection with their road, and the obligations given for the purchase by the company are void. *Ib.*
5. The acts of the Ohio legislature of 1851 and 1852, which authorized railroad companies to aid other railroad companies by means of subscription to their capital stock or otherwise, authorized a guaranty of their bonds. *Zabriskie v. The Cleveland, Columbus, and Cincinnati Railroad Company*, 604.....23 H. 381.

6. If an acceptance of the act of 1852 by one of these corporations was necessary, this acceptance may be inferred in favor of persons holding guarantied bonds by the companies doing the acts authorized by these statutes. *Ib.*
7. As against innocent purchasers for value of such guarantied bonds, a stockholder will not be permitted to contest the validity of the guaranty who was present at a meeting called to ratify the act of the board in making the guaranty, and who declined to vote against a resolution ratifying the act, which could not have passed if he had voted against it. *Ib.*
8. The charter of the town of Oakland, which gave power to lay out, make, open, widen, regulate, and keep in repair all streets, roads, bridges, ferries, wharves, docks, piers, slips, &c., and to authorize the construction of the same, did not authorize the town to grant an exclusive right of ferry between that town and San Francisco; and the ordinance of the town, so far as it attempts to grant such exclusive right, is void. *Minturn v. Larue*, 638.....23 H. 435.

EQUITY, GENERAL PRINCIPLES, 7, 8, 9.

COURT AND JURY.

The question of the abandonment of the invention by the inventor to the public, and the surreptitious discovery and use of it by the infringer, are questions to be submitted as matter of fact to the jury, under proper instructions from the court. *Kendall v. Winsor*, 1.....21 H. 322.

CONTRACTS, CONSTRUCTION OF, 9; PATENT LAW, 6, 7; WILLS, 1, 4.

CUSTOMS DUTIES.

This court adheres to the decision in *Sampson v. Peaslee*, 20 How. 571, (2 Miller, 605,) that the duty on foreign merchandise, under the act of March 3, 1851, is to be computed on their value on the day of sailing from the foreign port whence they are imported, and that the value for such purpose is the wholesale market price there on that day. *Irvine et al. v. Redfield*, 492.....23 H. 170.

DAMAGES—MEASURE OF.

1. The rule of damages is not the contract price of the defective machinery, but what it would cost plaintiff to make it equal to what it should have been. *Benjamin v. Hillard*, 485.....23 H. 149.
2. Where a plaintiff has furnished the jury no proper evidence of the damages sustained by an infringement of his patent, an instruction should be given when prayed which restricted the recovery to nominal damages. *City of New York v. Ransom*, 674.....23 How. 487.
3. The rule of damages for the use of an attachment to a fire-engine is not the value of the increased power given, or the saving to a city by the use of it, but the price at which the inventor sells to others, or what would be a fair price if no sales had been made. *Ib.*

DES MOINES RIVER GRANT.

By the act of August 8, 1846, congress granted to the territory of Iowa, "for the purpose of aiding said territory to improve the navigation of the Des Moines river from its mouth to the Raccoon fork, so called, in said territory, one equal moiety in alternate sections of the public lands (remaining unsold and not otherwise disposed of, incumbered, or appropriated,) in a strip of five miles in width on each side of said river, to be selected within said territory by an agent or agents to be appointed by the governor thereof, subject to the approval of the secretary of the treasury of the United States." The mouth of the Raccoon fork is about midway of the course of the Des Moines river in that territory: Held, that the grant did not include any lands above the mouth of the Raccoon fork, and that notwithstanding the approval of the secretary, and the patent of the State for lands above said fork,

the title so acquired was void. *Dubuque and Pacific Railroad Company v. Litchfield*, 457.....23 H. 66.

STATUTES, CONSTRUCTION OF, 2.

EQUITY.

— GENERAL PRINCIPLES.

1. An agreement by the corporators that bonds for work and materials should be a lien on the property of the company prior to all others will be enforced in equity as against the company. *White Water Valley Company v. Vallette*, 66.....21 H. 414.
2. The distinction between the remedies at law and in equity must be preserved in the federal courts, without regard to State statutes on the subject. *Fenn v. Holme*, 111...21 H. 481.
3. William Pinkney Lea and William Park Lea both located land in Tennessee, and both used the name of William P. Lea. The register of the land office, to prevent mistake, inserted in a patent the name of William *Park* Lea. The bill in this case, filed many years after, alleges this to be a mistake, and seeks equitable relief. Held, 1. That subsequent purchasers from William Park Lea without notice of the mistake will be protected in equity. 2. That actual possession by such a purchaser is notice of his title, though his deed was not recorded for some time afterwards. 3. That such actual possession as is shown in this case by the evidence, (for seven years,) under the statute of Tennessee, is a bar to the relief sought. *Lea v. The Polk County Copper Company et al.*, 120.....21 H. 498.
4. Where a contract for the sale of land, with an agreement to convey by deed of general warranty, has been executed by the delivery of possession and payment of the purchase money, the purchaser cannot, in the absence of fraud and concealment, refuse to receive a deed with proper covenants, or go into chancery to obtain indemnity against incumbrances. *Refeld v. Woodfolk*, 356.....22 H. 318.
5. Especially is this so where the incumbrance is such that it is uncertain whether anything will ever become payable or due on it, or, if so, what amount. *Ib.*
6. In such case, where the vendee has received possession, and parted with his purchase money, he must rely on the covenants of the title which he agreed to receive. *Ib.*
7. A court of equity has jurisdiction to compel the stockholders to pay the sums unpaid on their stock subscription of an insolvent corporation on a bill filed by a judgment creditor. *Ogilvie et al. v. Knox Insurance Company et al.*, 382.....22 H. 380.
8. After the subscribers to the stock of an insurance company have organized the corporation and paid the first installment, and conducted the business for several years in expectation of large profits, it is too late, when they find that the losses exceed the profits, to set up the want of truth in representations made to them when they subscribed for the stock. *Ib.*
9. In such a bill, where the object is to obtain satisfaction of plaintiff's judgment, it is not indispensable that all the creditors or all the shareholders should be parties to the suit. *Ib.*
10. Where a judgment at law has established the claim of a party against a decedent, the claimant can maintain a suit against said administrator and his sureties on the administrator's bond in chancery, where a discovery is necessary, or other equitable grounds of relief, without first obtaining judgment against the principal in the bond. *Green's Administratrix v. Creighton*, 464.....23 H. 90.
11. A married woman may receive and convey title to land without joining her husband, provided no right of his, legal or equitable, is affected by the conveyance. *Gridley v. Wynant*, 684.....25 H. 500.
12. The fact that the conveyance to her in trust for her son in law was made to defraud his creditors, gives her heirs no right to question the title of an innocent purchaser for value from her. *Ib.*
13. A trustee *feme covert* may, under the circumstances mentioned in the preceding

case, make a valid power of attorney to her son in law to convey, and when well executed it will carry the title. *Gridley v. Westbrook*, 686.....23 H. 503.

LIMITATIONS, 3, 4.

—BILL OF REVIEW.

1. A bill of review, founded on an allegation of fraud in procuring the original decree, cannot be sustained on that ground when the fraud is denied in the answer, and there is no sufficient evidence to sustain it. *McMicken's Executors v. Perin*, 333.....22 H. 232.
2. Nor will such a bill be sustained when the original decree was obtained by the neglect of the party seeking a review to defend the original suit. *Ib.*

—INJUNCTION TO LAND OFFICERS.

Under the act of congress of August 31, 1852, (10 U. S. Statutes, 143,) authorizing the issue of land scrip to the holders of outstanding military land warrants, the secretary of the interior is to determine who is entitled to its benefit: and the courts cannot interfere with him in the discharge of that duty, by injunction, on the ground that he is about to issue scrip to one person for which another person has a better right. *Walker v. Smith*, 183.....21 H. 579.

—JUDGMENTS.

A surety in an administration bond in Mississippi had a judgment rendered against him for default of his principal, and gave his note for the amount. Afterwards, in the courts of Tennessee, he brought a suit, in which his principals and the plaintiff in the first judgment were compelled to interplead, and in which suit a small sum was found due from the principal to plaintiff: Held, that this was a sufficient ground for the circuit court in Mississippi to enjoin the collection of the note given for the first judgment, as the liability of the surety could not exceed that of his principal, and because he had been induced to make no defense by false representations of the plaintiff in that judgment. *Cage's Executors v. Cussidy*, 468.....23 H. 109.

—PRACTICE.

1. When property held by a receiver *pendente lite* is by decree of the court vested in one of the parties to the suit, his title to it is perfect, and it is liable as other property to be levied on by execution for his debts. *Very v. Watkins*, 661.....23 H. 469.
2. But the receiver can only be held liable for not delivering to the successful party in the decree when a copy of that decree is produced to him, and a receipt tendered, accompanying the demand for delivery. Such a course is not a mere form. It is proper to prevent future litigation. *Ib.*
3. The bill in this case was brought to declare void a conveyance of real estate as made in fraud of creditors. Held, that though both vendor and vendee denied the fraud, and alleged in their answers that the purchase money had been paid, the following circumstances sufficiently rebutted the answer: Inadequate consideration of the price; possession and reception of rents by vendor; prior indebtedness of vendor, and pending suits against him; at the date of conveyance, well known to vendee, who was his brother, and the absence of all attention or evidence of interest of vendee in the matter, and of any proof of payment except the answer. *Callan v. Statham*, 667.....23 H. 477.
4. In a suit brought by a prior mortgagee to foreclose his mortgage, a subsequent mortgager is not a necessary party; and, if made parties, they need not join in the appeal when they did not appear, and the only matter in controversy was the amount of plaintiff's debt, which they did not contest. *Brewster v. Wakefield*, 256.....22 H. 118.

BILL OF REVIEW; EQUITY, GENERAL PRINCIPLES, 9, 10; LIMITATIONS, 5; MARRIED WOMEN, 1, 2, 3, 4; PRACTICE IN SUPREME COURT, 23.

EVIDENCE.

1. Pleadings in a suit between other parties, not signed by any party to the present suit, are inadmissible as evidence. *Combs v. Hodge*, 57..... 21 H. 397.
2. Where a power of attorney authorized the agent to sell and convey a large number of different parcels of land, but upon condition that any part of the purchase money not paid down must be secured by mortgage on real estate, this must be strictly complied with or the conveyance is void. *Morrill v. Cone and Cone*, 239..... 21 H. 75.
3. But, after long acquiescence and subsequent sale to *bona fide* purchasers, the statement of one of the grantors, that he is informed and believes that most of the lands had been sold without security or payment, except promissory notes, which he is informed and believes were in the hands of the agent when he died, a copy of which he annexes to his deposition, is inadmissible to contradict the presumption that the agent complied with the conditions of his power of attorney in this case. *Ib.*
4. Parol evidence may be used to show the nature of the transaction, where an endorser's name on a negotiable instrument precedes that of the payee. *Rey v. Simpson*, 366..... 22 H. 341.
5. For the purpose of impeaching a witness, the general question, "What is his reputation for moral character?" was properly overruled by the court below. *Teese v. Huntingdon et al.*, 430..... 23 H. 2.
6. It was also held to be within the discretion of the court to refuse to allow a witness to testify as to the other witness's reputation for truth and veracity five years previously, when he stated he knew nothing of his character since that time. *Ib.*
7. Where the foundation of the suit is a fraud, evidence is admissible of other similar frauds practiced by defendants on other persons about the same time, both before and after the one in controversy. *Castle v. Bullard*, 494..... 23 H. 172.
8. The fraud charged consisted in selling plaintiff's goods as commission merchants to an insolvent person, knowing him to be such, and in recommending said purchaser to plaintiff as solvent in regard to goods sold him by plaintiff. Held, that evidence of the insolvent character of said purchaser, and his acts and conduct in regard to such goods, and that defendants had made representations of a similar kind to other persons, are admissible, and that in a question of fraud to be proved by circumstantial evidence a wide range of inquiry is allowable. *Ib.*
9. The declarations of one of the co-sureties in a bond, who is dead, is not evidence against the other in a suit on the bond. Nor is his statement in writing evidence against his co-surety. *Very v. Watkins*, 661. 23 H. 469.

— USAGE.

1. In a suit or contract to deliver flour in definite quantities on seller's option, within defined limits as to time, at a fixed price, proof of a usage in that market to demand margins of the seller as security for delivery, and his refusal to comply with such a demand, is inadmissible. *Oelricks v. Ford*, 451..... 23 H. 49.
2. Such a usage is inconsistent with the contract, because it adds a term or condition not found in the written agreement. *Ib.*
3. If such a usage were admissible, there is no such evidence of its general recognition in this trade as should be submitted to the jury. *Ib.*
4. Nor can it be shown that there was a parol understanding that the contract was subject to such a usage. *Ib.*
5. The Screw Company being the sole manufacturers of wooden screws, were unable to supply the demands of all their customers as fast as needed. They adopted the system of apportioning their articles as fast as produced among their customers, having respect to the date of their orders. Held, that this usage being well known to plaintiffs who had ordered such goods, proof of the usage and of their following it in filling plaintiff's orders was admissible as a defense in plaintiff's suit for failing to deliver in time. *Bliven and Mead v. The New England Screw Company*, 629..... 23 H. 420.

6. Where the plaintiffs in the next preceding case, when sued for the price of the articles actually delivered, set up the failure to deliver the other articles ordered as a set-off or defense to the action, it was held that if the defendants had delivered according to the usage of their business as known to plaintiffs, the non-delivery beyond such usage was a defense to the counter claim. *Same v. Same*, 636.....23 H. 433.

CONTRACTS, CONSTRUCTION OF, 5; EQUITY, PRACTICE, 3; NEGOTIABLE PAPER, 8, 9, 10, 12;
PRACTICE IN SUPREME COURT, 3; WILLS, 1, 4.

— EXECUTION.

- A levy on personal property is not necessarily void because the officer does not take manual possession of it. He has the right to deposit goods with a receptor, and he may leave it, if he chooses, in the custody of the party who had possession when the levy was made. *Very v. Watkins*, 661.....23 H. 469.

EQUITY, PRACTICE, 1.

INDIANS.

1. When, by the treaty of October 27, 1832, with the Pottawatomie Indians, the tribe surrendered all their rights to the lands then ceded, and the United States agreed that certain quantities should be reserved to particular Indians, these latter became tenants in common with the government of the title in fee, until the President, after surveys were made, should locate these reservations. *Doe v. Wilson*, 65423 H. 457.
2. In the absence of anything in the treaty or any act of congress to prevent it, the individual Indian could sell and convey this title as fully as any other person. *Ib.*
3. Such a conveyance, made before the survey and the selection by the President and the issue of the patent, would attach to the land when patented; and the recital in the patent that it was for the land reserved for that individual Indian would be conclusive in favor of the purchaser as to its identity. *Ib.*

STATE STATUTES, 1, 2.

INSURANCE.

1. The language of the contract of insurance is that "Mordecai & Co. are insured on freight of barque Susan, hence to Rio Janeiro, and from thence to port of discharge in the United States." At Rio she took on a cargo for her return voyage, and started, and was compelled to put back to Rio, where she was condemned as unseaworthy: Held, that the contract was for insurance of all freight at risk at any time during the outward or return voyage, and covered the freight lost by the failure to complete the delivery of the return cargo. *Insurance Company of the Valley of Virginia v. Mordecai*, 254.....22 H. 111.
2. That the question whether the policy was an open or valued policy, or whether the company was released by reason of the condemnation of the vessel, cannot be raised here, because they were not raised in the court below, so far as the record shows. *Ib.*
4. The policy named one and a half per cent. as a nominal rate, with provisions that there should be "an additional premium if by vessels lower than A 2, or by foreign vessels," and that "the premiums on risks should be fixed at the time of the indorsement, and such clauses to apply as the company may insert as the risks are successively reported." Held, that in case of a risk reported on a vessel rating lower than A 2 it was the right of the company to fix the rate of premium; and unless the assured accepted those rates, and paid or secured the premium no contract of assurance was made. *The Oriental Mutual Insurance Company v. Wright*, 614.....23 H. 401.
4. An instruction of the court that the contract was complete when the risk was reported, and that the rate of premium to be paid was to be determined in such case by the court and jury on the trial, was erroneous. *Ib.*

5. Certain correspondence between the parties and acts of the agent, which were insisted on as a waiver of the right of the company to fix the premium, held not to have that effect. *Sun Mutual Insurance Company v. Wright*, 722.....23 H. 412.

INTEREST.

1. Where a contract was for the payment of a sum of money at a given time, with interest at a specified rate, this rate of interest is limited by such a contract to the time the note or contract was to run before maturity. *Brewster v. Wakefield*, 256.....22 H. 118.
2. After maturity, the rate of interest is governed by the statute or law of the State, and not by the contract. *Ib.*

JURISDICTION OF CIRCUIT COURT.

—CITIZENSHIP.

1. By the act of February 28, 1839, (5 U. S. Statutes, 321,) a suit can be maintained in the circuit court of the United States against one or more joint obligors, where others bound in the same instrument are not sued, when, by the judgment in said suit, the rights of the absent co-obligors would not be affected or injured. *Clearwater v. Mcrédieth*, 117.....21 H. 489.
2. In such case the jurisdiction would not be defeated by the fact that the obligors not sued were citizens of the same State with plaintiff. *Ib.*
3. The case of *Hill v. Smith*, 21 How. 284, (2 Miller, 788,) reaffirmed, and its principles applied to this case. *Ib.*
4. The eleventh section of the judiciary act does not apply where the holder of a negotiable bond with a blank for the name of payee fills it with his own name. *White v. Vermont and Massachusetts Railroad Company*, 181.....21 H. 575.
5. This court disclaims all jurisdiction in the federal courts to grant divorces or allow alimony; but where a valid decree for alimony has been made in a divorce suit in a State court, the federal court may, under proper circumstances, enforce the rights to the alimony thus decreed. *Barber v. Barber*, 186.....21 H. 582.
6. The circuit courts of the United States have jurisdiction, where the requisite citizenship is found to exist, to establish the claim of a plaintiff against the estate of a decedent, notwithstanding the pendency of probate proceedings in the State court to settle the estate under State laws. *Green's Administratrix v. Creighton*, 464.....23 H. 90.
7. When a cause has been removed from a State to a federal court under the 12th section of the judiciary act, the jurisdiction is not defeated because it turns out that the cause of action is one which could not have been originally brought in the circuit court by reason of the exception in section 11 of that act. *Green v. Custard*, 672.....23 H. 484.

ABATEMENT; AGENCY; MARRIED WOMEN, 2, 3, 4.

—ON APPEAL.

1. Where, in a contest in the district court for proceeds of a vessel sold under a decree in admiralty, the court decides to allow a particular claim, but makes no order of payment until all claims on the fund are adjusted, this is not such a final decree as authorizes the owner of the vessel to appeal to the circuit court. *Montgomery et al. v. Anderson et al.*, 48... ..21 H. 386.
2. The circuit court having no jurisdiction, its decree affirming that of the district court, and remanding it to the district court for further proceedings, is erroneous, and must be reversed here, and the case remanded with directions to remit the case from the circuit to the district court for a final decree, from which either party may then appeal. *Ib.*
3. The circuit court cannot remit its decrees in admiralty appeals to the district court

for execution, but the *res* must accompany the appeal, and the circuit court must render and enforce its own decree in the case. *Ib.*

4. The parties cannot, by an agreement in this court that there is now a final decree in the district court, give jurisdiction to this court in such a case as this. *Ib.*

JURISDICTION OF SUPREME COURT.

—AMOUNT IN CONTROVERSY.

1. The act of May 3, 1844, which authorizes a writ of error to either party, without regard to the amount in controversy, is limited to suits brought by the United States for the infringement of the revenue laws, and does not embrace a suit against a collector for duties imposed and paid in excess of what the law justifies. *Mason v. Gamble*, 51.....21 H. 390.
2. Such a case dismissed for want of jurisdiction, where the judgment against the collector is less than \$2,000. *Ib.*
3. Where a decree in admiralty for the owner of the vessel was for \$2,338.06 for his freight, but \$583.84 was against one defendant and \$1,754.22 against the other, and the latter alone appealed, the case must be dismissed—because: 1. The decree is several, and neither of the sums awarded exceed \$2,000. 2. Because if it could be held to be a joint decree, but one defendant has appealed. *Clifton v. Sheldon*, 670 23 H. 481.

PRACTICE IN SUPREME COURT, 11.

—GENERALLY.

1. Where a case has been dismissed, because no appeal was taken in the circuit court, it cannot be reinstated by an agreement in writing to waive this right, because such consent cannot give jurisdiction to this court. *Ballance v. Forsyth*, 51.....21 H. 389.
2. The doctrine of the *Insurance Co. v. Mordecai*, 2 Miller, 740, reaffirmed, to-wit, that a writ returnable on any other day than the first day of the term is fatally defective, and confers no jurisdiction. *Porter et al. v. Foley*, 54.....21 H. 393.
3. It can neither be amended here nor remitted to the circuit court for amendment; but, the case being dismissed, the plaintiff may withdraw the record, that it may be used in connection with a new and valid writ. *Ib.*
4. Where the writ or the copy of the writ of error filed with the transcript has no seal, the writ is void, and the case must be dismissed. *Overton et al. v. Cheek et al.*, 227.....22 H. 46.
5. The question of the jurisdiction of the inferior court is always a proper one for appeal to this court, and must stand for hearing on the merits. It is no ground for dismissal here on motion. *The Brigadier General Stokes (Nelson v. Leland)* 228..... 22 H. 48.
6. Where a writ of error describes the real plaintiff in error as defendant in error, and *vice versa*, the writ is fatally defective, and cannot be amended here; and the case must be dismissed for want of jurisdiction in this court. *Hodge et al. v. Williams*, 244.....22 H. 87.

—OVER STATE COURTS.

1. From a judgment of a State court discharging a prisoner held under an order of a court of the United States, a writ of error lies to this court under the 25th section of the act of 1789. *Ableman v. Booth*, 130.....21 H. 506..
2. A question of merger of the cause of action in a former judgment, or of *res judicata* in another State, as it affects the mere form of pleading, is not one of which this court can take jurisdiction from a State court. *White et al. v. Wright et al.*, 214.....22 H. 19.
3. That inasmuch as the State court, in deciding that the pre-emption entry of plaintiff below was valid, decided in favor of a right claimed under the authority of the

- register's and receiver's acts, the plaintiff in error cannot question that judgment in this court. *Hale v. Gaines*, 269.....22 H. 144.
4. An appeal from a decree of a State court dismissed, because no case can be brought here from a State court in any other mode than by writ of error. *Verden v. Coleman*, 287.....22 H. 192.
 5. The judgment of the State courts protecting parties as innocent purchasers, and by reason of the statute of limitations, is not subject to revision in this court. *Lytle v. Arkansas*, 288.....22 H. 193.
 6. But the question of fraudulent and false swearing in obtaining a certificate of pre-emption and a patent from the land office is one of which this court can take cognizance. *Ib.*
 7. An examination of the testimony in this case shows that the supreme court of Arkansas was right in holding that there was such fraud, and its judgment is therefore affirmed. *Ib.*
 8. A judgment of the supreme court of Missouri, which held invalid a title confirmed by the board of commissioners under the acts of congress to adjust claims under Spanish grants, may be reviewed in this court. *Berthold v. McDonald et al.*, 362.....22 H. 334.
 9. Where the same land was confirmed to two different persons, neither of whom has received a patent, the State court, in an action for possession, may rightfully inquire into the equities prior to the order of confirmation. *Ib.*
 10. Where that court held that the prior confirmation was void as against the second, because the deed on which it was founded was a fraud and forgery never recognized by the person actually owning the right, this court affirms that judgment. *Ib.*

JURISDICTION OF CIRCUIT COURT, ON APPEAL, 4.

LAND TITLES.

1. Where there is a specific and clear description in a deed of the land conveyed, it will limit words of a more general meaning by which other land would be included. *Parker v. Kane*, 20722 H. 1.
2. Under the recording acts of Wisconsin, when the grantee and grantor, in a deed which had been fully executed and delivered, destroyed it without recording it, and made another deed in its place, a purchaser for value without notice of the first deed will be protected against any title set up under it. *Ib.*
3. It is the settled doctrine of this court that no action of ejectment can be sustained in the federal courts on a certificate of entry in the land office. Where the statutes of the State have provided otherwise, it is only binding on the State courts, and not on the federal courts. *Fenn v. Holme*, 111.....21 H. 481. *Hooper v. Scheimer*, 521.....23 H. 235.
4. In all courts of common law the patent from the United States carries the fee, and is the best title known to such courts. *Ib.*

— SCHOOL LANDS.

1. The fund arising from the sale of the sixteenth section in each township is, by act of congress, to be used exclusively for the schools in that township. *Springfield Township v. Quick*, 235.....22 H. 56.
2. But an act of the State legislature which, preserving this principle, equalizes the distribution of school funds from other sources among all the townships, including this fund, but in such a manner that none of it is diverted, does not violate the act of congress, though a township may not get its proportionate share of the fund arising from other sources, by reason of the amount it receives from the sale of its sixteenth section. *Ib.*

EQUITY, GENERAL PRINCIPLES, 3; EVIDENCE, 2, 3; TEXAS LAND TITLES.

LIMITATION.

1. In an action of *assumpsit* brought to recover the amount paid to release the title of the judgment against the warrantor in the first suit, the statute of limitation of the State of Maryland, where this second action is brought, must govern. *Flowers v. Foreman*, 479.....23 H. 132.
2. The cause of action accrued on the covenant of warranty when the judgment of eviction was rendered, or when the defendant in that suit paid the money to satisfy the successful party in that suit. *Ib.*
3. Where the common ancestor died in 1793, seized of land in Detroit, and part of his heirs lived in Canada, and the two sons who lived with him at the time of his death continued in possession and occupation until the commencement of this suit in chancery in 1857, and one of the heirs had the land confirmed to him as a French grant by congress, and a patent issued to him; the case is one which depends on the establishment of an implied trust, and a court of equity will follow the courts of law in applying the statute of limitations. *Beaubien v. Beaubien*, 503.....23 H. 190.
4. It is no sufficient averment in the bill to avoid the statute that plaintiffs did not know until 1840 of acts and intentions of defendants in fraud of their rights. Some more definite statement of the acts of defendants in concealing the fraud and the efforts of plaintiffs to secure their rights is necessary to arrest the statute of limitations. *Ib.*

EQUITY, GENERAL PRINCIPLES, 3.

MARRIED WOMEN.

1. A woman who is divorced *a mensa et thoro* may maintain a suit in chancery against her husband, and it should be brought by her next friend. *Barber v. Barber*, 186.....21 H. 582.
2. Where the husband, after such a divorce, removes to and becomes a citizen of another State, leaving his wife behind, her domicile and citizenship remain where she is, and do not follow the husband. *Ib.*
3. Hence she can, by her next friend, bring a suit in the federal court of the State where he resides to enforce, on its equity side, the payment of the alimony which he was ordered to pay her in the divorce suit. *Ib.*
4. A decree of divorce *a vinculo*, obtained by the husband in the State court of his new residence, cannot deprive the wife of her right to alimony under the former decree. *Ib.*
5. A married woman may receive and convey title to land without joining her husband, provided no right of his, legal or equitable, is affected by the conveyance. *Gridley v. Wynant*, 684.....23 H. 500.
6. The fact that the conveyance to her in trust for her son in law was made to defraud her creditors, gives her heirs no right to question the title of an innocent purchaser for value from her. *Ib.*
7. A trustee *feme covert* may, under the circumstances mentioned in the preceding case, make a valid power of attorney to her son in law to convey, and when executed it will carry the title. *Gridley v. Westbrook*, 686.....23 H. 503.

CITIZENSHIP, 5.

MISSOURI LAND TITLES.

1. The United States, by various acts of congress, reserved from sale or other disposition lands to which claims had been set up under Spanish and French grants in the Louisiana purchase; but from the years 1829 to 1832 these reservation acts were annulled or inoperative. In 1836 the concession under which defendant held or claimed was confirmed by an act of congress. Held, that a location by plaintiff of a New Madrid certificate on this land in 1818, and a patent issued thereon in 1827, were void, because at both these dates it was reserved by act of congress, and the action of the land officers was without authority. *Easton v. Salisbury*, 72.....21 H. 426.

2. That the failure to renew or keep alive this reservation from 1829 to 1832 did not make valid the title of Easton which was void before. *Ib.*
3. In an action of ejectment in the courts of the United States, the plaintiff can only recover on the legal title, notwithstanding any statute of the State which authorizes a recovery on an equitable and inchoate legal title. *Fenn v. Holme*, 111.....21 H. 481.
4. Hence, in a suit on the right conferred by the location of a New Madrid certificate in Missouri, where no patent has issued on said location, the title being in the United States, the action cannot be maintained in the circuit court of the United States. *Ib.*
5. Gaines, plaintiff in court below, claimed title in ejectment under pre-emption allowed by land officers. Hale, defendant, claimed under an offer to locate a New Madrid certificate, which the land officer refused to allow: Held, that the New Madrid certificate could not be located on the land in 1818, because it was not surveyed and open to entry; nor in 1838, because the right to locate on lands in Arkansas expired in 1823 by act of congress. *Hale v. Gaines*, 269.....22 H. 144.
6. A prior pre-emption set up as an outstanding title is void, because the lands were reserved by act of congress from sale and pre-emption. *Ib.*

MORTGAGES.

1. It is the settled doctrine of the court that mortgages to secure future advances are valid when the transactions covered by it are fair and honest. *Lawrence v. Tucker*, 437.....23 H. 14.
2. A mortgage given to secure a note for \$5,000 and future advances for \$8,000 more on its face is a standing security for \$11,000, if so intended by the parties, and duly recorded, and will be held valid to that amount against subsequent purchasers or incumbrances, without reference to the actual amount advanced on the note at the time it was given and the mortgage executed. *Ib.*
3. A valid mortgage may be made to cover property to be acquired after the making of the mortgage; and a mortgage of a railroad, to be built thereafter, and rolling stock and other property appurtenant to such a road, attaches to the road and the rolling stock as they are built and acquired. *Pennock et al. v. Coe, Trustee*, 472.....23 H. 117.
4. Such a mortgage is a valid superior lien to that of a subsequent mortgage of the same property and to judgment creditors, and the latter will be enjoined in equity from selling such property on execution. *Ib.*
5. The holders of a part of the bonds secured by such second mortgage have no right to appropriate to their sole benefit, by such execution and sale, the property mortgaged to secure *all* said bonds. In such case, equality is equity. *Ib.*
6. The act of the Ohio legislature, (under which the road from Hudson to Millersburg, mortgaged in this case, was built,) by its fair construction, authorized the road which the company built. *Ib.*

MUNICIPAL BONDS.

1. Where the act which authorizes a municipal corporation to issue bonds is a public statute of the State, a purchaser of such bonds is chargeable with knowledge of the statute, and he must show that agents issuing the bonds were authorized to do so. *Commissioners of Knox County v. Aspinwall*, 155.....21 H. 539.
2. But where such officers (as county commissioners) are authorized to issue bonds upon a vote of the majority of the people, they must of necessity first decide whether such vote was lawfully given; and this decision cannot be called in question collaterally in a suit on such bonds brought by an innocent purchaser for value, they being negotiable, though such decision might be not conclusive in a direct proceeding to inquire into the facts, before the rights of third parties had attached. *Ib.*
3. A suit may be maintained for interest on the coupons which had been attached to such bonds, without the production of the bonds. *Ib.*

4. Where the charter of a railroad company authorized the counties through which the road ran to take stock and issue bonds in payment, neither the charter nor the vote of the citizens in favor of a subscription constitute a contract with the company until the subscription is actually made by the proper officers of the county. *Aspinwall et al. v. County of Daviess*, 377.....22 H. 364.
5. An amendment to the constitution of the State, made after the vote and before the subscription, forbid the counties from loaning their credit or borrowing money to pay such subscriptions; and the bonds issued after this in payment of a subscription made after the new constitution went into effect were void. *Ib.*

NEGOTIABLE PAPER.

1. Certificates of the public debt of the republic of Texas distinguished from negotiable instruments, and the distinction considered on the authorities. *Combs v. Hodge*, 5721 H. 397.
2. Successive endorsers of negotiable paper, as they appear on the paper, are not jointly liable, or liable for contribution, unless an express agreement to that effect exists. *McCarty and Wynn v. Roots et al.*, 75.....21 H. 432.
3. An endorser may take up the paper, after its maturity and dishonor, and place it as collateral security for his own debt to a third party, who can recover against the prior endorsers. *Ib.*
4. The fact that the party who, as endorser, took up the bill, was a trustee in an assignment for the benefit of creditors of the payer, is no defense, unless it is shown that, as such assignee, he had funds sufficient to pay the debt, which ought to be applied to that purpose. *Ib.*
5. That a bond, though a sealed instrument, which is payable to bearer or holder, or order, is a negotiable instrument, is established by the usage and the decisions of the courts of this country, though otherwise in England. *White v. The Vermont and Massachusetts Railroad Company*, 181.....21 H. 575.
6. Such a bond, with a blank for a payee, may be filled in with his own name by the last holder, and sued on by him. *Ib.*
7. Defendants, residing in Indiana, signed their name as acceptors to eight bills of exchange, which were blank as to date, amount, and names of drawer and payee, and sent them to Pittsburgh, to their correspondent, to have these blanks filled, and the drafts sold for the benefit of the defendants, which was done. Four of these drafts purported on their face to be first of exchange, and four to be second of exchange. Held, that notwithstanding these words, when their agent sold each draft thus accepted for value to a *bona fide* purchaser, the defendants were liable for the amount of each one of said drafts so accepted and sold. *Bank of Pittsburgh v. Neal and Neal*, 248.....22 H. 96.
8. Where a promissory note, made payable to a particular person or order, is first endorsed by a third party, such third person is held to be an original promisor, guarantor, or endorser, according to the nature of the transaction or understanding of the parties at the time it took place. *Rey v. Simpson*, 366.....22 H. 341.
9. Where such third person put his name on the paper, as surety for the maker, before it was delivered to the payee, he must be held to be an original promisor. *Ib.*
10. Parol proof of the circumstances under which the endorsement was made is admissible to show the nature of the transaction. *Ib.*
11. A notary public who has called several times at the business place of the acceptor of a bill of exchange on the day on which it is payable, and finds no person present to answer his demand, is not bound to seek such acceptor at his private residence. *Wiseman v. Chiapella*, 597.....23 H. 368.
12. His certificate that, with the draft in his possession, he had called several times on that day at the business place of the acceptor, is *prima facie* evidence that it was done at proper business hours; and if this is denied, the proof that it was not so devolves on the party disputing it. *Ib.*

13. The law in this respect, as regards presentation for acceptance, differs from presentation for payment. *Ib.*

PARTNERSHIP.

1. Though a partnership engaged strictly and solely in the business of farming by raising the productions of the farm has no occasion to draw bills of exchange, and one partner cannot bind the others by such bills, it is otherwise when the firm is also engaged in conducting a saw-mill, and buying and selling lumber. In such case the firm is properly a trading partnership, and can bind each other by drawing bills of exchange. *Kimbro v. Bullitt et al.*, 323.....22 H. 256.
2. When, under such circumstances, the drawee accepts for the accommodation of the partnership, and pays the bill, it is no defense for one partner that the managing partner applied the money to the purchase of slaves, forbidden by the law when the purchase was made. *Ib.*
3. One partner cannot confess a judgment against himself and other partners, so as to bind the latter by reason of the partnership alone. *Clark et al. v. Bowen et al.*, 329.....22 H. 270.
4. Where such a judgment is set aside as to the partner not joining in the confession, it should, on motion of the plaintiff, be set aside as to the other partners also. *Ib.*
5. This revives the notes on which judgment was rendered, so as to sustain a suit on them against all the partners. *Ib.*
6. An assignment made to secure the judgment so confessed will fall with the judgment when it is set aside. *Ib.*
7. The partnership being in possession of the goods as commission merchants, fraudulent representations by one or more of the firm to induce plaintiff to sell the goods to an insolvent purchaser, render the firm liable for the fraud. *Cusle v. Bullard*, 494.....23 H. 172.

ADMIRALTY, JURISDICTION, 2.

PATENT LAW.

1. The patent of Tatham, which was considered in this court in *Levy v. Tatham*, 14 H. 136, again reviewed and explained, and held to be valid, as describing a new combination of machinery, and the application of it to a newly-discovered property in lead, by which a new and useful result is produced. *LeRoy and Smith v. Tatham*, 261.....22 H. 132.
2. In a suit brought by the assignee of an extended patent for an infringement, a licensee of the patentee has the same rights against the assignee as he would have had against the assignor of the extended patent. *Chaffee v. The Boston Belling Company*, 300.....22 H. 217.
3. But an infringer, who was using the patented article before the extension and assignment, cannot protect himself by showing that another person was licensed to use the article, unless he connects himself in some way with that license, or as purchaser of instrument or thing used from such licensee. *Ib.*
4. Where the notice of proof of prior use of invention is sufficient, it is not essential to the introduction of the evidence on the trial that it should be served and filed in court with order of the court. *Teese v. Huntingdon et al.*, 430.....23 H. 2.
5. Depositions taken before such notice may be used on the trial in the same manner as if the witness were introduced in person. *Ib.*
6. While an inventor is experimenting with and perfecting his invention, if he voluntarily permits its use by the public, with no attempt to conceal or protect his invention, a party making one of his machines may lawfully use it after the patent has been issued. *Kendall v. Winsor*, 1.....21 H. 322.
7. But if the inventor has endeavored to conceal his invention, and has asserted his design to secure a patent as soon as perfected, one who has surreptitiously obtained

knowledge which enables him to construct and use the invention is liable as an infringer if he continue this use after the patent has been obtained. *Ib.*

COURT AND JURY; CONTRACTS, CONSTRUCTION OF, 1.

PRACTICE IN CIRCUIT COURT.

1. An exception to the refusal of a judge, after the term of the court, to sign a bill of exception, is a nullity. *Martin v. Ihmsen*, 55.....21 H. 394.
2. It is the settled doctrine of this court that the circuit court cannot order a nonsuit against the wish of the plaintiff. *Castle et al. v. Bullard*, 491.....23 H. 172.
3. Nor will this court, at the close of the evidence on both sides, direct a verdict of acquittal, or permit a jury to pass on the guilt of one defendant among several, where there is any testimony against him which should go to the jury, though the other defendants may wish to use him as a witness. *Ib.*
4. Though, as a general principle, a plea is not demurrable because not verified by oath, as the statute requires, but the objection must be raised by motion, yet where the State court has held that the omission of the verification is good ground of demurrer, the circuit court should follow the rule of the State court on that subject. *Bell v. Corporation of Vicksburg*, 643.....23 H. 443.

CONTRACTS FOR BUILDING, 6; EQUITY, GENERAL PRINCIPLES, 2; EQUITY, PRACTICE, 1, 2; JURISDICTION OF CIRCUIT COURT, ON APPEAL, 1, 2, 3, 4; LAND TITLES, 3, 4.

PRACTICE IN SUPREME COURT.

1. Where the value of the property in controversy is stated in the pleadings or other proceeding in the court below, it is not admissible to prove a different value to affect the jurisdiction of this court. *Richmond v. The City of Milwaukee*, 53... ..21 H. 391.
2. Nor will this court in any case receive affidavits of that character to reinstate a case which has been dismissed because the sum in controversy was less than \$2,000. *Ib.*
3. Case wanting on appeal in evidence of material matters within the knowledge of the parties to the suit reversed and remanded for amended pleadings and further testimony. *Combs v. Hodge*, 57.....21 H. 397.
4. Where an appeal has been docketed and dismissed under rule 63 at one term, the same case cannot be docketed and heard at another term without another appeal. *Rogers et al. v. Law*, 147.....21 H. 526.
5. Where, under the code of procedure in the courts of Minnesota territory, a jury is waived, and a case tried without exceptions, the appellate court there cannot review the facts. *Lawler v. Clafin*, 215.....22 H. 23.
6. The only question open in this court, as the record comes here, is whether the mortgage was discharged; and this court concurs with the supreme court of the territory that it was not. *Ib.*
7. Where a case is submitted to the circuit court in the district of Louisiana, and the court certifies to facts which support the plaintiff's claim, the defendant, who took no exception in the course of the trial, cannot be permitted here to argue that there was not sufficient evidence to sustain the finding of facts by that court. *Cucullu v. Emmerling*, 243.....22 H. 83.
8. Although, by the laws of the territory, all suits, whether of common law or equity cognizance, are carried from the lower court to the supreme court of the territory by writ of error, that does not affect the mode of removing them to this court; and as this case is essentially of an equitable character, it is properly brought here by appeal from the supreme court. *Brewster v. Wakefield*, 256.....22 H. 118.
9. Where the record of a case shows that it was submitted to the court without a jury, and there are no facts found by the court, nor any bill of exceptions, this court can do nothing but affirm the judgment. *New Orleans v. Gaines*, 268.....22 H. 141.

10. Copies of documents and records of a former suit attached to the answer cannot be considered here, as there is nothing to show that they were offered in record in the court below. *Ib.*
11. On a writ of error to the circuit court for the District of Columbia, where the judgment is removal from office, the salary being \$1,000 per annum, is sufficient for jurisdiction, though it be paid monthly. *United States, ex rel Crawford, v. Addison*, 28122 H. 174.
12. The writ of error in such case operates as a *supersedeas*, and prevents the removal of the incumbent defendant until the case is decided in this court. *Ib.*
13. A *mandamus* will not be granted in such case to compel the inferior court to execute its judgment, notwithstanding the fact that the term for which the relator was elected will expire before the case can be heard in this court. *Ib.*
14. Where no question was raised by the plaintiffs in error in the court below for the consideration of this court, and none is raised here by counsel or otherwise, the judgment will be affirmed with damages for delay. *Kilbourne v. State Savings Institution*, 428.....22 H. 503.
15. Where the appeal has been allowed, but no appeal bond given either for the costs or a *supersedeas*, the appeal will not be dismissed if the appellant file a sufficient bond within a reasonable time to be fixed by this court. *Anson, Bangs & Co. v. Blue Ridge Railroad Company*, 429.....23 H. 1.
16. Such bond must be approved by one of the judges authorized to allow the appeal. *Ib.*
17. Where there is conflicting evidence as to the amount of the damages, the judges of the court below can best determine that question, and this court will not reverse a decree on a mere doubt raised by conflicting testimony on that subject. *Philadelphia, Wilmington, and Baltimore Railroad Company v. Philadelphia and Havre de Grace Steam Towboat Company*, 507.....23 H. 209.
18. Where a part of the plaintiffs in a suit in chancery appeal, and other plaintiffs do not appeal, nor are otherwise before this court, a motion to dismiss the appeal for that reason is, on account of the peculiar circumstances of the case, ordered to stand over for final hearing upon the merits. *Day v. Washburn*, 559.....23 H. 309.
19. Where parties are sued on a promissory note to which they have no defense, but set up a sham one, and bring the case here on writ of error, the court will on motion affirm with ten per cent. damages. *Sutton v. Bancroft*, 566.23 H. 320.
20. This court, on motion of the attorney general, sets aside a former order of the court dismissing an appeal in this cause—because: 1. No order granting such appeal was ever made in the court below. 2. The filing the record in this court and motion to dismiss were frauds upon the court and upon the attorney general, and the transcript was false and fraudulent in setting out an order allowing the appeal. The conduct of Ord and others in this matter examined, criticised, and condemned by the court. *United States v. Gomez*, 568.....23 H. 326.
21. Where there is no bill of exceptions, no merits of any kind shown in the defense below, the judgment here will be affirmed with ten per cent. damages per annum, counting from the date of the judgment below. *Jenkins v. Banning*, 653.....25 H. 455.
22. The genuineness of this grant is fully established by the evidence, and the decree confirming it is affirmed, but no directions will be given here as to its location, because no such question was raised in the court below. *United States v. Berreyesa's Heirs*, 682 23 H. 499.
23. Where, in cases removed from the State courts of an equitable character, the pleadings and other proceedings have been according to the State code of practice, this court will decide the case on the merits, when they can be seen from the record. *Gridley v. Westbrook et al.*, 686.....23 H. 503.

JURISDICTION OF SUPREME COURT, AMOUNT IN CONTROVERSY, 2; GENERALLY, 2, 3, 5;

JURISDICTION OF CIRCUIT COURT, 4; TAX TITLE, 3.

RES JUDICATA.

1. Where a party to a partition, prosecuted in the State court of Wisconsin, filed his bill in the same court, asserting an adversary title as to part of the land, he is bound by the final decree, in a subsequent action of ejectment on the same title, against the other parties and their privies to the first suit. *Parker v. Kane*, 207.....22 H. 1.
2. Under the monition act of Louisiana, where the proper notices have been given, a judgment of the court confirming a judicial sale is conclusive on everybody. *Jeter v. Hewitt et al.* 371.....23 H. 352.
3. Where a person interested in property so sold brings a suit in the circuit court of the United States to assert a right to such property, he is bound by the laws of Louisiana and by the judgment of her courts. *Ib.*
4. The proceedings in monition relied on in this case are conclusive of the rights of the parties. *Ib.*
5. Where the estate of an insolvent decedent in Louisiana was settled and wound up by syndics whose acts were approved by the creditors and homologated by the proper probate court, the proceedings are conclusive, in the absence of fraud, on all who took part in them. *Adams v. Preston and Wife*, 415 22 H. 473.
6. In a subsequent suit brought in the circuit court of the United States by an assignee of one of the parties to that proceeding, the purchaser of property of the deceased under those proceedings will be protected, in the absence of fraud, though there may have been irregularities not affecting the jurisdiction in the probate proceedings. *Ib.*
7. A voucher of a warrantor to defend in Louisiana an ejectment for land the title of which he covenanted to warrant, is not bound by the judgment obtained against him in that suit on his covenant when he had not been served with notice, though a curator had been appointed by this court, and defended for him. *Flowers v. Foreman*, 479.....23 H. 132.

JURISDICTION OF SUPREME COURT, OVER STATE COURTS, 2.

STATE STATUTES.

1. The supreme court of the State of New York decided that the statute of that State which forbids any other than Indians to settle on an Indian reservation, and authorized a summary proceeding for their ejectment, is constitutional. Held, by this court, that it was a police regulation, and a proper subject of State legislation, not in conflict with the federal constitution or any act of Congress. *State of New York v. Dibble*, 34.....21 H. 366.
 2. That though the relators secured a title under the State of Massachusetts to the land, this act of the State did not violate the contract of purchase of Ogden and Fellows, because no right of possession under that contract accrued until the United States saw fit to remove or compel the removal of the Indians. *Fellows v. Blacksmith*, 19 How. 366, (1 Miller, 763.) *Ib.*
 3. Though by the law of Pennsylvania, where the assignment was made, the assignee of an open account cannot maintain an action, he can do so in Louisiana, where the law is otherwise. *Martin v. Ihmsen*, 55.....21 H. 394.
 4. In the latter State, the running of the time of prescription is interrupted by a suit concerning the matter of the subsequent suit in which prescription is pleaded. *Ib.*
- See CONSTITUTIONAL LAW, 8, 9; LAND TITLES, 2; LIMITATION, 1; RES JUDICATA, 2, 3, 4, 7; SUNDAY LAWS; TAX TITLES, 4, 5; WILLS.

STATUTES, CONSTRUCTION OF.

1. Where the act of congress of 1812 giving bounty lands to regular soldiers, made all sales void before the patent issued, and another act of 1826 permitted the soldier to relinquish the land already patented and make a new location: Held, that the restriction on sale of the right to relocate did not exist, as nothing was said to that purport in the act of 1826. *Maxwell et al. v. Moore*, 285.....22 H. 185.

DES MOINES RIVER GRANT.

SUNDAY LAWS.

- 2 It is no defense to the claim for damages arising from this negligence of defendant that the injury occurred while libellant was violating the Sunday law of Maryland by working on the Sabbath. *Philadelphia, Wilmington, and Baltimore Railroad Company v. Philadelphia and Havre de Grace Steam Tugboat Company*, 507.... 29 H. 209.

TAX TITLE.

1. Upon the true construction of the charter of the city of Washington of 1820, as amended by the act of 1824, it is not a condition necessary to the validity of a sale of unimproved lots or lands for taxes that the personal estate of the owner, though living in Washington, should be previously exhausted. *Thompson et al. v. Roe*, 393.....22 H. 422.
2. Nor does the ordinance of the city directing the collecting officer to levy first on personal property, unless the owner otherwise consents in writing, affect the validity of the sale made without such consent, or such previous resort to personal property of the owner. *Ib.*
4. An objection that a deed on a sale for taxes shows fraud on its face, which points to no special indication of fraud, cannot be noticed in this court. *Thomas v. Lawson*, 9.....21 H. 331.
5. The statutes of Arkansas make the sheriff's deed on a sale for taxes evidence of the regularity and legality of such sale, and this casts the burden of showing the opposite on the other party. *Ib.*
3. There is also a statute of the same State which authorizes a petition in the nature of a bill in chancery to confirm and quiet the title acquired by a tax deed; and when a decree is rendered on such petition, where all persons have been notified by publication to come in and defend, is conclusive of the title. *Parker v. Overman*, 18 How 140, (1 Miller, 121.) *Ib.*

TEXAS LAND LAWS.

1. It is the well-settled doctrine of the courts of Texas that, prior to the separation from Mexico, aliens to that country could not inherit lands of their deceased kin dying in Mexico; and this court must follow those decisions as the rule governing titles to real property in that State. *Middleton v. McGrew*, 449.....25 H. 45.

TREATY WITH WURTEMBERG CONSTRUED.

The treaty with Wurtemberg, which provides that "the citizens or subjects of each of the contracting parties shall have power to dispose of their personal property within the States of the other, by testament, donation, or otherwise; and their heirs, legatees, and donees, being citizens or subjects of the other contracting party, shall succeed to their said personal property, and may take possession thereof and dispose of the same at their pleasure, paying such duties as the inhabitants of the country where the property lies shall be liable to pay in like cases," has no application to the property of a naturalized citizen of the United States dying in Louisiana. His property is governed in this respect by the same rule as other citizens of Louisiana; and though formerly a citizen of Wurtemberg, he has no rights under that clause of the treaty. *Frederickson v. Louisiana*, 645.....23 H. 445.

USURY.

1. The bonds on which this suit is founded are not usurious on their face, nor does the extrinsic evidence support the allegation that there was usury in the contract under which they were issued. That the work for which they were done was at large profits, known to both parties, does not establish a design to allow usurious interest and evade the statute. *White Water Valley Company v. Vallette*, 66.....21 H. 414.

2. A contract by such a corporation, if originally usurious, may be validated by an act of the legislature, since usury is founded on a public policy which the legislative power may reverse as far as it chooses. *Ib.*

WILLS.

- 1 The testator made his will in 1845, and it was witnessed by Spear and Hinckley and Ridley, the sindico. The testator died in 1848, Spear in 1846, Hinckley in 1847, and Ridley in 1852. The defendant, Norris, was in possession of the land devised by the will from the death of testator, and the question turned on the validity of the will. Held, that the binding force and legal operation of the will were to be governed by the law as it existed when the codicil was made; and the mode in which it should be submitted to the court and jury, and the effect to be given to the testimony that accompanied it, depend upon the law of the forum at the time of the trial. *Adams v. Norris*, 587.....23 H. 353.
2. Such a will is not inadmissible under the laws of California, because it had not previously been admitted to probate, and because the witnesses had not been examined to establish it as an authentic act. *Ib.*
3. Nor is it void because it does not appear on the face of the will that the witnesses were present during the whole time of its execution, and heard and understood its contents. *Ib.*
4. Nor was it error to leave it to the jury, on the evidence, to decide if there was a custom in California of general prevalence of ten years' standing, having the tacit assent of the authorities previous to the annexation to the United States, as to the manner of making wills, so prevailing and notorious as to presume their assent, operating as a modification or repeal of prior laws. *Ib.*



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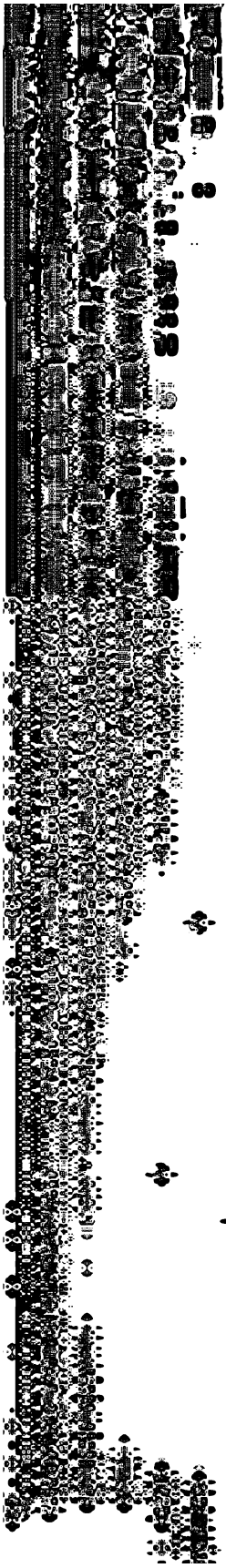
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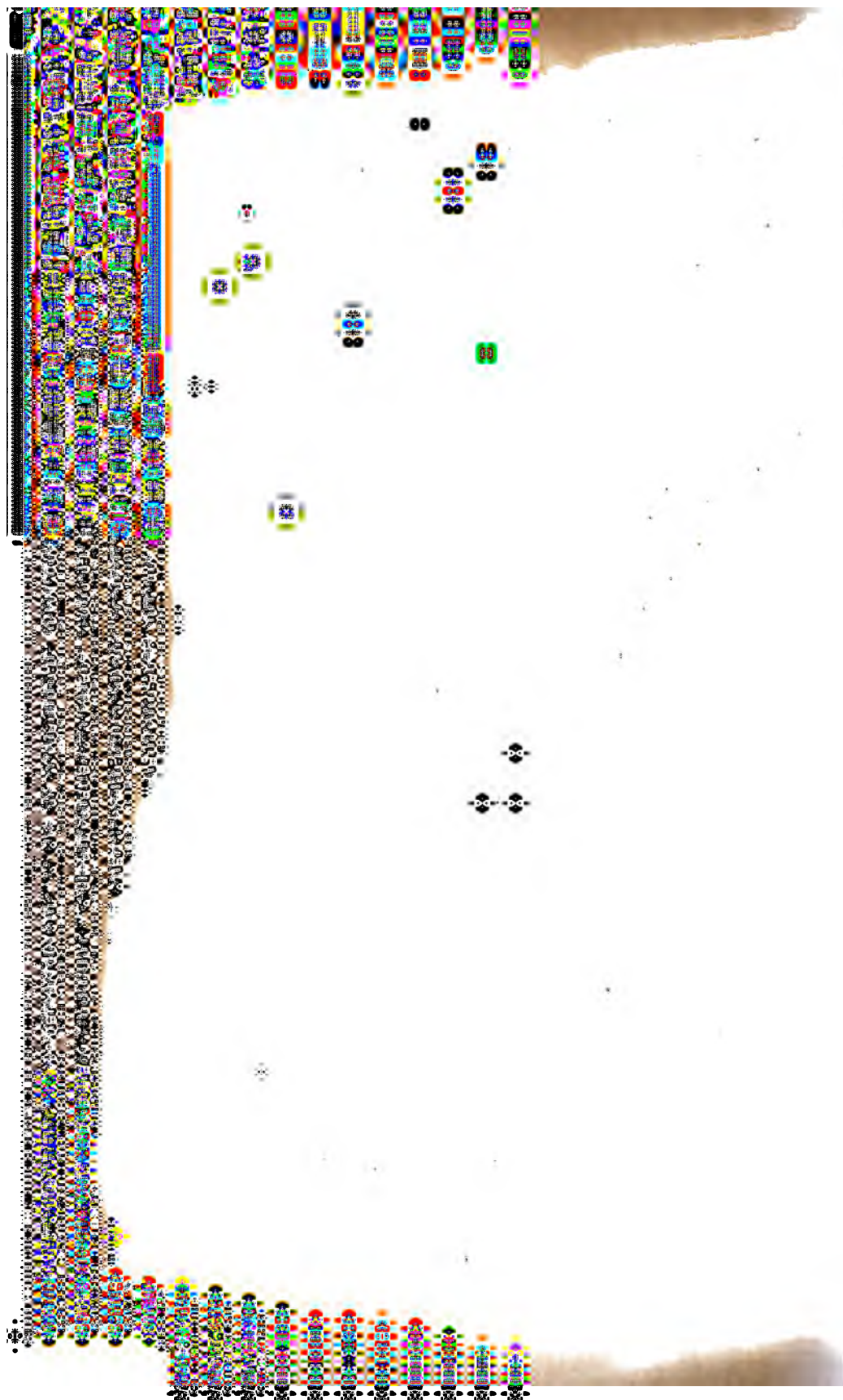
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1. The first part of the document is a list of the names of the persons who have been named in the proceedings.

2. The second part of the document is a list of the names of the persons who have been named in the proceedings.

